Supreme Court, U.S.
FILED

011459 APR - 4 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

KENNETH J. ELWOOD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

SABRIJA RADONCIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

AUSTIN C. SCHLICK
Assistant to the Solicitor General

DAVID J. KLINE
DONALD E. KEENER
HUGH G. MULLANE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

9931

QUESTION PRESENTED

Section 1226(c)(1) of Title 8 of the United States Code requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony. Section 1226(c)(2) of Title 8 prohibits release of those aliens during administrative proceedings to remove them from the United States, except in very limited circumstances not present here. The question presented in this case is:

Whether respondent's mandatory detention under Section 1226(c) violates the Due Process Clause of the Fifth Amendment, where respondent entered the United States without inspection and was convicted of an aggravated felony while unlawfully present in the United States.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	3
Reasons for granting the petition	13
Conclusion	23
Appendix A	1a
Appendix B	7a
Appendix C	18a
Appendix D	22a

TABLE OF AUTHORITIES

Cases:

Fiallo v. *Bell*, 430 U.S. 787 (1977)	16, 18
Friends of the Earth v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000)	21
Hoang v. *Comfort*, No. 01-11361, 2002 WL 339348 (10th Cir. Mar. 5, 2002)	14, 15, 16, 19
Johnson v. *Eisentrager*, 339 U.S. 763 (1950)	17
Kim v. *Ziglar*, 276 F.3d 523 (9th Cir. 2002)	14, 15
Landon v. *Plasencia*, 459 U.S. 21 (1982)	17
Parra v. *Perryman*, 172 F.3d 954 (7th Cir. 1999)	13, 14, 15, 18
Patel v. *Zemski*, 275 F.3d 299 (3d Cir. 2001)	12, 13, 15, 16, 18, 19, 20
Plyler v. *Doe*, 457 U.S. 202 (1982)	16, 19
Shaughnessy v. *Mezei*, 345 U.S. 206 (1953)	16, 18-19
Stone v. *INS*, 514 U.S. 386 (1985)	10
United States v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968)	21
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)	22

Cases—Continued: Page

United States v. *Radoncic*, 986 F. Supp. 845 (D. Vt. Vt. 1997) 6
Zadvydas v. *Davis*, 121 S. Ct. 2491 (2001) 5, 14, 17, 19

Constitution and statutes:

U.S. Const. Amend. V 2, 11, 17
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 3
§ 304(a), 110 Sat. 3309-587 to 3009-593 5
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 3
8 U.S.C. 1101(a)(42)(A) 6
8 U.S.C. 1101(a)(43) 4
8 U.S.C. 1101(a)(43)(N) 11, 22
8 U.S.C. 1101(a)(43)(U) 11
8 U.S.C. 1158 (§ 208) 5
8 U.S.C. 1226(c) ..... *passim*
8 U.S.C. 1226(c) (§ 236(c)) 2, 3, 4
8 U.S.C. 1226(c)(1) 2, 4, 11
8 U.S.C. 1226(c)(1)(B) 11
8 U.S.C. 1226(c)(2) 3, 4
8 U.S.C. 1226(e) (1994) 18
8 U.S.C. 1227(a)(2)(A)(ii) 11
8 U.S.C. 1227(a)(2)(A)(iii) 22
8 U.S.C. 1229 5
8 U.S.C. 1229a 5
8 U.S.C. 1231 21
8 U.S.C. 1231(a) (§ 241(a)) 5, 19
8 U.S.C. 1231(b)(3) 6
8 U.S.C. 1251(a)(1)(B) (1994) 5, 10
8 U.S.C. 1251(a)(1)(E)(i) (1994) 7, 10
8 U.S.C. 1252(a)(2) (1994) 18
8 U.S.C. 1253(h)(1) (1994) 6
8 U.S.C. 1253(h)(2)(B) (1994) 8

Statutes—Continued: Page

8 U.S.C. 1324(a)(1)(A)(i) 7, 11
8 U.S.C. 1324(a)(1)(A)(iii) 22
18 U.S.C. 371 ..... 7, 11
28 U.S.C. 2241 ..... 11, 20

Miscellaneous:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988) 6, 8, 9
H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1 (1996) 4, 19
S. Rep. No. 48, 104th Cong., 1st Sess. (1995) 18
S. Rep. No. 249, 104th Cong., 2d Sess. (1996) 4

In the Supreme Court of the United States

No.

KENNETH J. ELWOOD, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

SABRIJA RADONCIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the District Director of the Philadelphia District of the Immigration and Naturalization Service (INS), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is not published in the *Federal Reporter*, but is reprinted at 28 Fed. Appx. 1113. The memorandum opinion and order of the district court (App., *infra*, 7a-17a) is reported at 121 F. Supp.2d 814.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 1226(c) of Title 8 of the United States Code provides:

> **Detention of criminal aliens**
>
> **(1) Custody**
>
> The Attorney General shall take into custody any alien who—
>
> **(A)** is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> **(B)** is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> **(C)** is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [*sic*] to a term of imprisonment of at least 1 year, or
>
> **(D)** is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. 1226(c) (footnote omitted).

STATEMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to streamline procedures for removing certain criminal aliens from the United States. As the House Report on IIRIRA explained, Congress concluded that "our immigration laws should enable the prompt admission of those who are entitled to be admitted, the prompt

exclusion or removal of those who are not so entitled, and the clear distinction between these categories." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 111 (1996). Congress further determined that "[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others, potential legal immigrants whose presence would be more consistent with the judgment of the elected government of this country about what is in the national interest." S. Rep. No. 249, 104th Cong., 2d Sess. 7 (1996).

The provision of IIRIRA that is at issue in this case is Section 236(c) of the INA, 8 U.S.C. 1226(c). Section 1226(c)(1) requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed specified crimes. In the case of deportable aliens, Section 1226(c)(1) applies when the alien has been convicted of an aggravated felony (as defined in 8 U.S.C. 1101(a)(43)); two or more crimes involving moral turpitude or a crime of moral turpitude that resulted in a sentence of at least one year's imprisonment; a controlled-substance offense, other than simple possession of 30 grams or less of marijuana; a firearms offense; certain crimes such as espionage, sabotage, treason, and threatening the President; and certain immigration offenses. See 8 U.S.C. 1226(c)(1). Section 1226(c)(2) prohibits release of those aliens during the pendency of administrative proceedings instituted to remove them from the United States, except in very limited circumstances involving witness protection. See 8 U.S.C. 1226(c).

Detention under Section 1226(c) lasts only for the duration of the criminal alien's administrative removal

proceedings.[1] Detention of an alien following entry of a final order of removal is governed by Section 241(a) of the INA, 8 U.S.C. 1231(a), which this Court interpreted in *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001).

2. a. Respondent is a native and citizen of Serbia-Montenegro, which formerly was part of Yugoslavia. See App., *infra*, 1a. In March 1991, respondent and his wife (also a citizen of Serbia-Montenegro) entered the United States illegally by crossing the Mexican border near San Diego without inspection by an immigration officer. *Id.* at 1a, 23a; see A.R. 694. In November 1993, after taking up residence in New York, respondent and his wife applied for asylum in the United States. App., *infra*, 1a-2a. They claimed that they would be persecuted because of their Muslim religion if returned to Serbia-Montenegro. *Id.* at 2a.[2]

In March 1996, the INS charged respondent with being deportable because of his illegal entry into the United States. App., *infra*, 2a; see 8 U.S.C. 1251(a)(1)(B) (1994). Respondent was not taken into custody at that time. In July 1996, at a hearing held before an immigration judge (IJ), respondent conceded that his illegal status made him deportable under the INA, but he requested asylum or withholding of deportation.[3]

---

[1] In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-593, Congress instituted a new form of proceeding—known as "removal"—that applies to aliens who have entered the United States but are deportable, as well as to aliens who are excludable at the border. See 8 U.S.C. 1229, 1229a.

[2] Respondent and his wife have two children, who were born after the parents' illegal entry and therefore are citizens of the United States. See App., *infra*, 2a, 47a.

[3] Section 208 of the INA, 8 U.S.C. 1158, authorizes the Attorney General, in his discretion, to grant asylum to an alien who is otherwise removable but is a "refugee." The term "ref-

Respondent also sought withholding or deferral of removal pursuant to Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988) (Convention Against Torture). The IJ set a hearing on respondent's claims for September 1997. App., *infra*, 2a, 8a-9a.

In August 1996, while respondent's deportation proceedings were pending, respondent was arrested in Vermont and charged with smuggling other illegal aliens into the United States. App., *infra*, 2a. That was respondent's third arrest for smuggling aliens across the Canadian border. In 1993, respondent had been indicted in the Eastern District of Michigan for smuggling activity involving numerous aliens between January 1993 and April 1993. In July 1996, respondent had been arrested in Champlain, New York, for alien smuggling. See *United States* v. *Radoncic*, 986 F. Supp. 845, 846-848 (D. Vt. 1997); App., *infra*, 37a-38a.

Also in August 1996, the INS amended the immigration charges against respondent by adding an additional charge of deportability based on alien smuggling. A.R.

---

ugee" is defined in the INA as an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). In addition, if the Attorney General determines that an alien's "life or freedom would be threatened" in the country of deportation "on account of race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for "withholding of deportation or return," which now is known as "withholding of removal." If the alien makes the necessary showing, withholding of deportation or removal is mandatory. 8 U.S.C. 1253(h)(1) (1994); 8 U.S.C. 1231(b)(3).

1891-1892; see 8 U.S.C. 1251(a)(1)(E)(i) (1994). In April and July 1998, while respondent's criminal case in Vermont was ongoing, the IJ held a three-day hearing on respondent's applications for relief from deportation.[4] See App., *infra*, 25a-28a. Respondent testified that, as a Muslim, he had been subjected to discrimination, threats, humiliation, and physical abuse by Serbian authorities, and that he had been sentenced to four months' imprisonment for not responding to a draft notice and (in absentia) to three years' imprisonment for threatening the territorial integrity of Serbia-Montenegro. Respondent said that he feared detention, torture, and possible death at the hands of the authorities if he was returned to Serbia-Montenegro. *Id.* at 28a-41a (summarizing respondent's testimony).

In January 1999, respondent was convicted in the United States District Court for the District of Vermont of smuggling aliens into the United States in January 1996, in violation of 8 U.S.C. 1324(a)(1)(A)(i), and of conspiring to smuggle aliens into the United States in January 1996, in violation of 18 U.S.C. 371. The district court sentenced respondent to 18 months' imprisonment. App., *infra*, 2a-3a; see *id.* at 43a-44a; A.R. 641-642 (criminal judgment). At the sentencing hearing, however, the district court stated that respondent "did not become wealthy" from his smuggling activities and "a major purpose" of bringing aliens illegally across the border was "in service of [respondent's] local community" in Serbia-Montenegro and New York. A.R. 551. The district court therefore "recommend[ed] strenuously" that the INS not deport

---

[4] In June and July 1999, the IJ held a two-day hearing on respondent's wife's claims. App., *infra*, 28a.

respondent upon the completion of his criminal sentence. *Ibid.*[5]

On April 11, 2000, the IJ denied respondent's applications for withholding of deportation and relief from removal under the Convention Against Torture.[6] App., *infra*, 53a-71a. The IJ found that respondent put fraudulent documents into the administrative record in an effort to prove criminal convictions in Serbia-Montenegro, which "seriously undermined the entire[t]y of his testimony." *Id.* at 54a. The IJ further found that respondent's hearing testimony was implausible and inconsistent. *Id.* at 56a-57a. Because respondent did not provide credible evidence in support of his applications for relief, the IJ ruled that the applications must be denied. *Id.* at 57a.

Additionally, the IJ held that respondent was ineligible under the INA and INS regulations for either withholding of deportation or relief under the Convention Against Torture, because his alien-smuggling convictions in the Vermont case were for a "particularly serious crime" and respondent presented a danger to the United States. App., *infra*, 57a-58a; see 8 U.S.C. 1253(h)(2)(B) (1994). The IJ specifically rejected respondent's claim that his smuggling was motivated by humanitarian concerns. See App., *infra*, 59a-62a. The

---

[5] The court of appeals' block quotation from the sentencing transcript contains errors. Compare App., *infra*, 3a with A.R. 551. Most importantly, the sentencing judge did *not* find that service to other Serbia-Montenegrins was "*the* major purpose" of respondent's smuggling. App., *infra*, 3a (emphasis added).

[6] At an earlier hearing on March 4, 1998, the IJ had found respondent ineligible for asylum because he had been found guilty of an aggravated felony (alien smuggling). App., *infra*, 24a-25a & n.2. Respondent, who had not yet been convicted and sentenced, did not contest that determination. See A.R. 490.

IJ found that respondent repeatedly lied about his illegal smuggling activities; that the illegal aliens he assisted had already "reached a safe haven" in Canada; that respondent carried out the smuggling "in the manner of an experienced criminal"; and that he was "clearly an integral part of an ongoing smuggling scheme carried out for profit." *Id.* at 62a. Respondent, the IJ determined, "ha[d] shown no rehabilitation or remorse whatsoever" and, if allowed to remain in the United States, would be "at serious risk to resume his illegal activit[y]," which "by its nature poses a risk to the security of the United States." *Ibid.* The IJ thus concluded that respondent "is more of a hardened criminal than he would like the court to believe." *Ibid.*

Based on those findings, the IJ denied respondent's applications for relief and ordered respondent (who was still serving his federal sentence for alien smuggling) removed from the United States to Serbia-Montenegro. App., *infra*, 70a.

b. On November 13, 2001, the Board of Immigration Appeals (Board) upheld the IJ's decision and dismissed respondent's appeal. App., *infra*, 18a-21a. The Board held that respondent was ineligible for asylum and withholding of deportation, and for withholding of removal under the Convention Against Torture, because of his alien-smuggling convictions. *Id.* at 19a. The Board also affirmed the IJ's determination that respondent submitted fraudulent certificates of conviction and did not provide credible testimony in support of his application for relief under those provisions. *Ibid.* Finally, the Board considered whether respondent had shown that he was eligible for deferral (as opposed to withholding) of removal under the Convention Against Torture, and concluded that respondent was not eligible because he had failed to establish a likelihood that he

would be tortured if returned to Serbia-Montenegro. *Id.* at 19a-20a.[7]

In December 2001, respondent filed a motion requesting the Board to reopen its administrative proceedings and reconsider its decision. Respondent argues in his motion (which is pending before the Board) that his Vermont conviction should not have been treated as grounds for denial of asylum or withholding of removal; that the record should be reopened for submission of new evidence that some aliens whom respondent smuggled across the border have been granted asylum; and that the Board and the IJ should have taken into account the possibility that respondent lied in his removal proceedings because he feared persecution if returned to Serbia-Montenegro. In addition, on December 11, 2001, respondent filed a petition for review of the Board's decision with the United States Court of Appeals for the Second Circuit. See *Radoncic* v. *Ashcroft*, No. 01-4201.[8]

---

[7] The Board concluded (App., *infra*, 18a) that the IJ had not addressed the INS's charge of deportability under 8 U.S.C. 1251(a)(1)(E)(i) (1994) based on alien smuggling, and therefore sustained only the IJ's determination that respondent was deportable under 8 U.S.C. 1251(a)(1)(B) based on his own illegal entry into the United States. The Board also sustained the IJ's decision ordering the removal of respondent's wife. App., *infra*, 20a.

[8] The Board's removal decision is final for purposes of judicial review notwithstanding respondent's filing of a motion for reopening or reconsideration by the Board. See *Stone* v. *INS*, 514 U.S. 386 (1985). Although there was no formal agreement or court order to postpone briefing on respondent's petition for review pending the Board's disposition of his motion to reopen, respondent did not file his opening brief on March 14, 2002, when it was due in the Second Circuit.

3. Meanwhile, on May 19, 2000 (shortly after the IJ entered a removal order against respondent), respondent completed his prison sentence on the alien-smuggling convictions and was released by the Federal Bureau of Prisons into the custody of the INS. App., *infra*, 4a, 10a. Because respondent's conviction under 8 U.S.C. 1324(a)(1)(A)(i) and his conspiracy conviction under 18 U.S.C. 371 constituted aggravated felony convictions, see 8 U.S.C. 1101(a)(43)(N) and (U), and rendered respondent deportable under 8 U.S.C. 1227(a)(2)(A)(ii), the INS detained respondent as required by Section 1226(c). See 8 U.S.C. 1226(c)(1)(B). An IJ denied respondent's request for a bond hearing, concluding that the mandatory nature of Section 1226(c)(1) deprives IJs of jurisdiction to consider such applications. See App., *infra*, 10a.

On August 28, 2000, respondent filed a habeas corpus petition, pursuant to 28 U.S.C. 2241, in the United States District Court for the Eastern District of Pennsylvania. App., *infra*, 7a, 10a. Respondent did not dispute that he was subject to mandatory detention under Section 1226(c), but only asserted in the petition that his mandatory detention, without an individualized bond hearing, denied him due process of law in violation of the Fifth Amendment.

On November 8, 2000, the district court granted respondent's habeas petition. App., *infra*, 7a-17a. The district court held that respondent was entitled to substantive due process protection despite his status as an illegal alien, *id.* at 11a-12a, 15a-16a, and that he had a "fundamental liberty interest" in being free from what it termed "indefinite detention," *id.* at 14a. Then, concluding that "due process requires a current individualized evaluation to determine whether [respondent's] continued indefinite detention is necessary to

prevent a risk of flight or a threat to the community," the district court ordered the INS either to release respondent from custody or to commence an individualized bond hearing within 30 days. *Id.* at 16a.

On November 29, 2000, an IJ set bond at $5000. Respondent posted bond and was released from detention. App., *infra*, 5a.

4. The government timely appealed the district court's grant of habeas corpus relief to the United States Court of Appeals for the Third Circuit. App., *infra*, 5a. On December 19, 2001, while the government's appeal was pending, the Third Circuit issued a decision in *Patel* v. *Zemski*, 275 F.3d 299. *Patel*, which also presented a due process challenge to the constitutionality of Section 1226(c) and was argued on the same day as this case, had been brought by a lawful permanent resident. See App., *infra*, 5a; 275 F.3d at 303. The court of appeals held in *Patel* that "mandatory detention of aliens after they have been found subject to removal but who have not yet been ordered removed because they are pursuing their administrative remedies violates their due process rights unless they have been afforded the opportunity for an individualized hearing at which they can show that they do not pose a flight risk or a danger to the community." *Id.* at 314; see *id.* at 314 n.13.

On January 4, 2002, the court of appeals affirmed the district court's grant of relief in this case. App., *infra*, 1a-6a. The court held that "[a]lthough the facts in *Patel* differ to some extent from those applicable to [respondent], the legal issue is the same." *Id.* at 5a. The court therefore concluded that respondent "was constitutionally entitled to an individualized assessment of the risk of flight and danger to the community on a current basis." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has held an Act of Congress unconstitutional. The decision below warrants review on that ground alone. In addition, the four courts of appeals that have considered the constitutionality of 8 U.S.C. 1226(c) have reached divergent results. The question of the constitutionality of Section 1226(c) is of substantial and recurring practical importance, because this statutory provision applies to thousands of criminal aliens currently in custody and to hundreds of additional criminal aliens each week against whom removal proceedings are commenced.

1. Review by this Court is warranted to resolve the disagreement among the courts of appeals about the constitutionality of an Act of Congress. The court of appeals in this case relied on its holding in *Patel* v. *Zemski*, 275 F.3d 299 (3d Cir. 2001), that substantive due process requires that criminal aliens who are held under Section 1226(c), and who are challenging their removal from the United States in administrative proceedings, must be given an individualized bond hearing. In *Patel*, the court of appeals reasoned that mandatory detention implicates what it found to be an alien's "fundamental right to be free from physical restraint," *id.* at 310, and that Section 1226(c) is "excessive" in relation to Congress's objectives, *id.* at 311.

In *Patel*, the Third Circuit expressly disagreed (275 F.3d at 313-314) with the reasoning and holding of *Parra* v. *Perryman*, 172 F.3d 954 (1999), in which the Seventh Circuit rejected a due process challenge to Section 1226(c). In *Parra*, the alien (who, like Patel, was a lawful permanent resident) conceded that he was removable from the United States because of a criminal conviction. The Seventh Circuit held that

because the alien's "legal right to remain in the United States ha[d] come to an end," he had no protected liberty interest in remaining at large in this country that outweighed the government's interest in detention to ensure removal. *Id.* at 958.

In *Kim* v. *Ziglar*, 276 F.3d 523 (2002), the Ninth Circuit held that mandatory detention under Section 1226(c) violated due process as applied to a lawful permanent resident alien. The Ninth Circuit reasoned that lawful permanent residents "have the most ties to the United States of any category of aliens" and the greatest legal rights, and are entitled to remain in the United States until a final removal order is entered against them. 276 F.3d at 528. The Ninth Circuit further reasoned that the resulting liberty interest of the permanent resident alien outweighed the government's interests in mandatory detention and required an individualized bond hearing to address the alien's flight risk and dangerousness if released. *Id.* at 530-534.

Most recently, in *Hoang* v. *Comfort*, No. 01-1136, 2002 WL 339348 (Mar. 5, 2002), the Tenth Circuit held that Section 1226(c) violated substantive due process as applied to three aliens who were lawful permanent residents. *Id.* at *11. Like the Third Circuit in *Patel*, the Tenth Circuit expressly disagreed with the Seventh Circuit's assessment of criminal aliens' liberty interests, concluding (2002 WL 339348, at *6) that *Parra*'s reasoning had been undermined by *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001), in which this Court found that aliens who were under a final order of removal but could not be repatriated to their home nation had a protected liberty interest in freedom from "detention that is indefinite and potentially permanent." *Id.* at 2502. The Tenth Circuit then concluded that Section 1226(c) is not

narrowly tailored to serve the government's compelling interests in ensuring criminal aliens' appearance at removal proceedings and protecting the public. 2002 WL 339348, at *8-*11.

Thus, four circuits have addressed the constitutionality of mandatory detention of criminal aliens during removal proceedings, and reached inconsistent conclusions. The Seventh Circuit has found Section 1226(c) constitutional as applied to criminal aliens who have "little hope" of avoiding removal from the United States. *Parra*, 172 F.3d at 958. The Ninth and Tenth Circuits have held Section 1226(c) unconstitutional as applied to lawful permanent resident aliens, but the law's constitutionality as applied to other groups of criminal aliens in those circuits is uncertain. See *Kim*, 276 F.3d at 527 ("We are not prepared to hold * * * that detention under the statute would be unconstitutional in all of its possible applications."); *Hoang*, 2002 WL 339348, at *11 (holding Section 1226(c) unconstitutional "as applied to the petitioners as lawful permanent resident aliens"). In the Third Circuit, Section 1226(c) has been held unconstitutional as applied to a lawful permanent resident alien (in *Patel)* and an illegal alien (in this case). The Third and Tenth Circuits, moreover, have expressly rejected the Seventh Circuit's reasoning in *Parra*. See *Patel*, 275 F.3d at 313-314; *Hoang*, 2002 WL 339348, at *6. Review is warranted to resolve this circuit conflict.

2. As just discussed, the Ninth Circuit in *Kim* and the Tenth Circuit in *Hoang* limited their due process holdings to the situation of aliens who are lawful permanent resident aliens. Those circuits have not addressed the application of Section 1226(c) to illegal aliens like respondent. However, the Seventh Circuit's holding in *Parra* that Section 1226(c) is constitutional as

applied to a lawful permanent resident alien who had "little hope" of avoiding removal (see 172 F.3d at 958) would apply as well to aliens who entered the United States unlawfully, and therefore conflicts not only with the decisions of the Ninth and Tenth Circuits in *Kim* and *Hoang*, but also with the Third Circuit's invalidation of Section 1226(c) in this case.

In any event, the importance of the constitutionality of Section 1226(c) warrants definitive resolution by this Court now. The Third Circuit has held an Act of Congress unconstitutional. Section 1226(c), moreover, directly serves Congress's "power to expel or exclude aliens," which this Court has recognized as "a fundamental sovereign attribute" that should be "exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953)); see *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982) ("Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field."). Even courts of appeals that have held Section 1226(c) unconstitutional have recognized the importance of the government's interests in ensuring the availability of criminal aliens for removal proceedings and protecting the public against additional crimes by those aliens. *Hoang*, 2002 WL 339348, at *9-*10; *Patel*, 275 F.3d at 312.

The constitutionality of Section 1226(c) has great practical importance for the administration of the immigration laws. Since IIRIRA's enactment in 1996, the INS has detained more than 75,000 criminal aliens pursuant to the requirements of Section 1226(c). Each week, there are hundreds of new INS detentions under

Section 1226(c) as new removal proceedings against criminal aliens trigger mandatory detention.

3. The decision of the court of appeals in this case is incorrect. As an initial matter, the court of appeals erred in holding (App., *infra*, 5a) that due process analysis "is the same" whether the alien is a permanent resident alien, as in *Patel*, or an illegal alien who entered the United States without inspection or authorization, as in this case. As this Court recognized in *Zadvydas*, the due process protection to which a deportable alien is constitutionally entitled "may vary depending upon status and circumstances." 121 S. Ct. at 2501; see *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."). A lawful permanent resident is entitled to constitutional protections consistent with that status. *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."). At the other extreme, an alien who is seeking admission into the United States at the border cannot claim any Fifth Amendment protection. See *Zadvydas*, 121 S. Ct. at 2500. Because respondent had no legal entitlement to enter the United States, it follows that any due process right he may have to be free from confinement while contesting his removal from the United States is far less than the right of an alien who previously was granted permanent resident status.

The court of appeals, moreover, substituted its own judgment for Congress's determinations regarding the importance of detaining criminal aliens. Those aliens have been convicted of particular crimes that Congress

specifically enumerated, and they have enjoyed full due process protections in connection with their convictions. Thus, criminal aliens have *already* been accorded the opportunity for an individualized hearing on the essential predicate for detention under Section 1226(c).

The court of appeals reasoned in *Patel* (275 F.3d at 311-312) that an individualized hearing to assess a criminal alien's flight risk and danger to the community would not compromise the accomplishment of the objectives that underlie Section 1226(c). That reasoning is incorrect. Section 1226(c) was enacted in direct response to the failure of earlier immigration provisions that provided for the individualized hearings that the court of appeals required here. See 8 U.S.C. 1252(a)(2) (1994) (mandating detention of aggravated felons except upon demonstration by alien of lawful entry and no threat to community or flight risk); 8 U.S.C. 1226(e) (1994) (mandating detention of aggravated felons who sought admission to United States except when alien's home country refused to repatriate and alien demonstrated absence of threat to community). The Senate Governmental Affairs Committee, for instance, found that in New York during fiscal year 1993, 88% of all aliens who were ordered to surrender for deportation failed to appear. S. Rep. No. 48, 104th Cong., 1st Sess. 24 (1995); see also *id.* at 23 (as of 1992, nearly 11,000 aliens convicted of aggravated felonies had failed to appear for their deportation hearings). The House Judiciary Committee found that "an important subset of the annual growth in the number of illegal aliens—as many as 50,000 or more—consists of those who have been ordered deported, but are not actually removed"; that criminal aliens released on bond had "disappear[ed] into the general population of illegal aliens"; and that "[a] chief reason why many deportable aliens

are not removed from the United States is the inability of the INS to detain such aliens through the course of their deportation proceedings." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 119, 123 (1996).

Contrary to the court of appeals' understanding in *Patel*, *Zadvydas* does not suggest that Section 1226(c) is constitutionally infirm. See 275 F.3d at 309 (relying on *Zadvydas*). In *Zadvydas*, the critical fact—which the Court found to raise a sufficient constitutional doubt to warrant an implied temporal limitation on the detention of lawful permanent resident aliens who were subject to a final order of removal—was that the INA otherwise would have authorized "indefinite, perhaps permanent, detention." 121 S. Ct. at 2503. Section 1226(c), by contrast, applies only during the alien's administrative removal proceedings.[9]

4. The Solicitor General has authorized the filing of a petition for a writ of certiorari to review the Ninth Circuit's decision in *Kim*, as well as the Third Circuit's decision in this case. The petition in *Kim* will be filed on or before April 9, 2002. Review is warranted in both this case and *Kim*, in order to ensure a definitive resolution of the constitutional issue. That is so for two reasons.

First, granting certiorari in this case involving an illegal alien, as well as in a case involving a lawful permanent resident alien, will allow the Court to address the constitutionality of Section 1226(c) in a wider range of applications. Because of the recurring nature of due process challenges to Section 1226(c), both the Executive Branch and the Judicial Branch have a strong

---

[9] As already noted, detention of an alien who is under a final order of removal is governed by 8 U.S.C. 1231(a), the provision this Court interpreted in *Zadvydas*.

interest in resolving this issue as soon as possible. If the Court were to decide the issue only as applied to a lawful permanent resident alien, or only as applied to an illegal alien, there might—depending upon the Court's holding—be continuing disagreement in the lower courts about the constitutionality of applying Section 1226(c) to other groups of aliens.

Second, the inherently limited duration of detention under Section 1226(c) creates a recurring mootness issue in challenges brought under 28 U.S.C. 2241. An alien is subject to detention under Section 1226(c) only until there is a final administrative order of removal. Habeas corpus challenges to mandatory detention under Section 1226(c) have often become moot because the alien has been ordered removed or actually has been removed from the United States, or (in a few instances) because there has been a determination that the alien is not removable.[10] An alien's detention under Section 1226(c) also may terminate if he secures judicial relief from an earlier criminal conviction that triggered mandatory detention. This heightened potential for mootness in habeas challenges to Section 1226(c) makes it appropriate to hear argument in more than one case, thereby reducing the possibility that mootness might prevent the Court from addressing the due process issue on the merits at all.

---

[10] In the *Patel* case, for example, there was a final order of removal before the court of appeals issued its habeas corpous decision. See 275 F.3d at 304 n.3. Although the court of appeals decided the case as if the alien was still being held under Section 1226(c), *ibid.*, the substantial mootness question in *Patel* (see note 11, *infra*) makes it an unsuitable vehicle for this Court's review, particularly since *Kim* also presents the question of the constitutionality of Section 1226(c) as applied to a lawful permanent resident.

This case is not now moot, and it is unlikely to become moot before the Court renders a decision if it grants review. A case becomes moot when it is "absolutely clear that the allegedly wrongful behavior"—*i.e.*, detention under Section 1226(c)—"could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *Friends of the Earth* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). That is not the case here.

Since November 13, 2001, when the Board issued a final order of removal in respondent's case, the statutory provision governing his detention and release has been 8 U.S.C. 1231 rather than 8 U.S.C. 1226(c). But respondent has sought review of the Board's removal decision in the Second Circuit. See p. 10, *supra*. If that case proceeds to decision and the court of appeals reverses or vacates the final removal order entered by the Board, it could then remand for further proceedings before the Board or an IJ. At that point, respondent would again be subject to mandatory detention under 8 U.S.C. 1226(c). In addition, respondent has filed a motion with the Board to reopen his removal proceedings and remand to the IJ for consideration of additional evidence and arguments against removal. See p. 10, *supra*. The motion to reopen likewise raises the possibility that respondent's final removal order could be rescinded and he could again be subject to detention under Section 1226(c) rather than Section 1231(a). This case therefore is not now moot, and it is unlikely to become moot before the Court has an opportunity to resolve the constitutional issue. The

same is true in *Kim*, in which administrative removal proceedings have not yet been completed.[11]

For the foregoing reasons, review is warranted in this case as well as in *Kim*. The Court should grant the petition in this case and the petition to be filed in *Kim*, and the two cases either should be set for oral argument in tandem with one another or should be consolidated for oral argument.[12]

---

[11] The mootness concerns in *Patel*, by contrast, are more immediate. The alien in *Patel* has challenged the Board's final removal order in the Third Circuit (*Patel* v. *Ashcroft*, No. 01-3365) on the ground that his criminal conviction for harboring an undocumented alien, in violation of 8 U.S.C. 1324(a)(1)(A)(iii), is not within the category of convictions that requires removal from the United States. But see 8 U.S.C. 1101(a)(43)(N) and 1227(a)(2)(A)(iii). That contention raises a pure issue of law that the Third Circuit will take under submission on April 8, 2002, without oral argument. It therefore appears unlikely that Patel's judicial challenge, even if successful, would result in further administrative removal proceedings, which would be necessary to trigger Section 1226(c) once again. Patel, moreover, has not filed a motion to reopen his removal proceedings. In these circumstances, the Solicitor General determined that a petition for a writ of certiorari would not be filed in *Patel*.

[12] If the Court concludes that this case is now moot, however, the petition should be granted, the decision below should be vacated, and the case should be remanded to the court of appeals with instructions to dismiss it as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

AUSTIN C. SCHLICK
Assistant to the Solicitor General

DAVID J. KLINE
DONALD E. KEENER
HUGH G. MULLANE
Attorneys

APRIL 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1074

(D.C. CIVIL No. 00-CV-04394)

SABRIJA RADONCIC, UNITED STATES EX REL.

v.

CHARLES ZEMSKI CHARLES ZEMSKI, ACTING DISTRICT DIRECTOR IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

Argued Sept. 20, 2001

Opinion Filed Jan. 4, 2002

On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
District Judge: Hon. Bruce W. Kauffman.

Before: SLOVITER, NYGAARD and MCKEE, Circuit Judges.

MEMORANDUM OPINION OF THE COURT

SLOVITER, Circuit Judge.

Sabrija Radoncic, a citizen and native of Serbia Montenegro, entered the United States without inspection in March 1991. He resided in New York with his wife,

also a citizen and native of Serbia Montenegro, and their two minor United States citizen children. In November 1993, Radoncic and his wife, who are Muslims, applied for asylum on the basis of religious persecution. In March 1996, the Immigration and Naturalization Service ("INS") issued Orders to Show Cause charging Radoncic and his wife with deportability for entering the country without inspection pursuant to former Immigration and Naturalization Act ("INA") § 241(a)(1)(B), 8 U.S.C. § 1251(a)(1)(B).

At a hearing before an immigration judge ("IJ") on July 24, 1996, Radoncic and his wife conceded deportability as charged, but requested asylum, withholding of deportation, and voluntary departure in the alternative. Radoncic also sought withholding or deferral of removal pursuant to Article 3 of the Convention Against Torture. The INS set a hearing date of September 25, 1997.

On August 15, 1996, Radoncic was arrested by the United States Border Patrol in Vermont and charged with smuggling other Muslims from Serbia-Montenegro into the United States. He was held in custody until August 29, 1996 when a $5000 bond was posted and he was released from custody. Radoncic remained free from custody throughout the duration of the criminal trial. On motion by the INS on August 25, 1997, the IJ presiding over Radoncic's deportation proceedings adjourned the proceedings pending the result of the criminal case inasmuch as that outcome would affect Radoncic's eligibility for relief. The hearing was reset for March 4, 1998.

On January 25, 1999, Radoncic was convicted of smuggling aliens into the United States in violation of

8 U.S.C. § 1324(a)(1)(A)(i) and of conspiracy to smuggle aliens into the United States in violation of 18 U.S.C. § 371. Radoncic was sentenced to eighteen months in prison and he voluntarily surrendered to serve on February 23, 1999. In imposing the sentence the presiding judge, Judge William K. Sessions III of the United States District Court for the District of Vermont, stated,

> The Court finds this to be an extraordinary situation. Whether or not profit was gained, the defendant did not become wealthy. The major purpose was in service of his community in Yugoslavia and Astoria, NY. Also, the Court finds that this defendant is not a dangerous person. Therefore, the Court strenuously recommends that this defendant not be deported upon completion of his sentence and that this statement from the Court be sent to the Immigration Court.

App. at 15.

At the March 4, 1998 hearing, the IJ noted that Radoncic had been convicted and would be sentenced at a later date. On this basis, the IJ found Radoncic ineligible for asylum but potentially still eligible for withholding of deportation and set an individual hearing date for April 20, 1998. On April 20, 1998, Radoncic testified in support of his applications for relief during part of a multi-day hearing in which testimony and evidence was offered regarding his eligibility for relief. He claimed that as a Muslim he was subjected to repeated discrimination and threats by Serbian authorities, including a four-month prison sentence for not responding to a draft notice, and feared future persecution should he be forced to return. On April 11, 2000,

the IJ concluded that Radoncic was not credible based on his submission of two fraudulent conviction documents which purported to show that he had been convicted of hostile activity against Yugoslavia, as well as inherent inconsistencies in his evidence. The judge subsequently denied Radoncic's application for relief from deportation and ordered that he be removed to Serbia Montenegro. An appeal from that decision to the Board of Immigration Appeals ("BIA") was pending at the time of oral arguments. Since that time, we have learned that the BIA denied Radoncic's appeal and Radoncic has filed a motion for reconsideration before the BIA as well as an appeal of the BIA's decision, currently pending before the Court of Appeals for the Second Circuit.

Upon Radoncic's release from federal incarceration in May 2000, the INS placed him in detention in the general population of the York County Prison, and denied him release from custody pursuant to INA § 236(c), 8 U.S.C. § 1226(c) (2001). On August 28, 2000, Radoncic filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of his detention. In his petition, Radoncic argued that detention without an individualized hearing on risk of flight or danger to the community violates his Fifth Amendment Due Process rights. On November 8, 2000, the District Court granted his petition, finding that due process required an individualized hearing on the necessity of detention, and ordered Radoncic released from custody unless the government commenced an individualized evaluation within thirty days to determine if detention was necessary. *Radoncic v. Zemski*, 121 F. Supp.2d 814 (E.D. Pa. 2000). Additionally, the

District Court ordered that if Radoncic demonstrated that he was not a threat to the community or a flight risk, the government must immediately release him from custody on bond upon reasonable conditions. *Id.* at 818-19. The government timely appealed.

On November 29, 2000, Radoncic appeared before an IJ to request bond in light of the District Court order. The IJ set bond at $5000 which Radoncic posted. Radoncic is no longer in INS custody and awaits a decision from the Second Circuit on his appeal from the deportation order.

In *Patel v. Zemski*, No. 01-2398, 2001 U.S. App. LEXIS 26907, at *2 (3d Cir. Dec. 19, 2001), a case argued on the same day as the one before us here, the issue presented was whether an alien can be mandatorily detained pending a final determination on removal without any opportunity for an individualized determination of the alien's risk of flight or danger to the community. After considering the arguments on behalf of the alien and the INS, we held that "mandatory detention of aliens after they have been found subject to removal but who have not yet been ordered removed because they are pursuing their administrative remedies violates their due process rights unless they have been afforded the opportunity for an individualized hearing at which they can show that they do not pose a flight risk or danger to the community." *Id.* at *40.

Although the facts in *Patel* differ to some extent from those applicable to Radoncic, the legal issue is the same. It follows that, as the District Court held, Radoncic was constitutionally entitled to an individualized assessment of the risk of flight and

danger to the community on a current basis. The relevant facts with respect to Radoncic, and their applicability to the factors that will determine whether he should be released or detained, are matters that can be considered by the judge presiding over that individualized assessment.

Accordingly, we will affirm the decision of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

No. Civ. A. 00-CV-4394

UNITED STATES EX REL. SADRIJA RADONCIC,
PETITIONER

v.

CHARLES ZEMSKI, ACTING DISTRICT DIRECTOR
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE, RESPONDENT

[Filed: Nov. 8, 2000]

MEMORANDUM AND ORDER

KAUFFMAN, District Judge.

Petitioner Sabrija Radoncic ("Radoncic"), an alien from Serbia-Montenegro currently in the custody of the Immigration and Naturalization Service ("INS"), has filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, in which he contends that confining him indefinitely, without the possibility of release on bail, is a denial of his substantive and procedural due process rights.[1] He now seeks an immediate hearing

---

[1] Radoncic has been detained indefinitely in the general population of a county prison pursuant to 8 U.S.C. § 1226(c), which man-

before an Immigration Judge to determine his eligibility for release on bail. Respondent, the Acting District Director, Immigration and Naturalization Service, Philadelphia District ("Respondent") has opposed the petition, first arguing that Radoncic has failed to exhaust his administrative remedies before the Board of Immigration Appeals and, in the alternative, that § 1226(c) is constitutional.[2] As explained more fully below, the Court holds that § 1226(c) violates Radoncic's right to due process of law and that he is entitled to the relief set forth in the Order that follows this Memorandum.

BACKGROUND

In March 1991, Radoncic and his wife, natives of Serbia-Montenegro, entered the United States "at or near an unknown point along the Mexican border . . . without inspection by an immigration officer." In November 1993, the couple applied to the INS for asylum.[3] On March 11, 1996, the INS issued an Order to Show Cause charging Radoncic and his wife with deportability under former INA § 241(a)(1)(B), 8 U.S.C. § 1251(a)(1)(B), for entering the country without inspection. At a hearing held before an Immigration Judge on

---

dates his detention and has been construed to deny him the possibility of release on bail while removal proceedings are pending.

[2] Following a hearing before this Court on September 7, 2000, Respondent withdrew its argument that Radoncic was required to exhaust administrative remedies. Respondent concedes that the Court has habeas jurisdiction regarding the issue of the constitutionality of the mandatory detention provisions.

[3] Radoncic testified that he is a Muslim, that he fled Serbia-Montenegro because he had been subjected to religious persecution, and that he feared that he would be killed if compelled to return.

July 24, 1996, they conceded deportability as charged, but requested "asylum, withholding of deportation, and voluntary departure in the alternative."

On August 15, 1996, Radoncic was taken into custody by the United States Border Patrol and charged with smuggling other Muslims from Serbia-Montenegro into the United States. On August 29, 1996, *a $5,000.00 bond was posted, and Radoncic was released from custody.* He subsequently was convicted of smuggling aliens into the United States in violation of 8 U.S.C. § 1324 and of conspiracy to smuggle aliens into the United States in violation of 8 U.S.C. § 371. On January 25, 1999, Judge William K. Sessions III of the United States District Court for the District of Vermont sentenced him to an 18-month term of incarceration. When imposing the sentence, Judge Sessions made the following significant findings and recommendation:

> The Court finds this to be an *extraordinary situation.* Whether or not profit was gained, the defendant did not become wealthy. The major purpose was in service of his community in Yugoslavia and Astoria, NY. Also, *the Court finds that this defendant is not a dangerous person.* Therefore the Court *strenuously recommends* that this defendant *not be deported* upon completion of his sentence and that this statement from the Court be sent to the Immigration Court. . . . .

United States v. Radoncic, No. 2:97CR00047-001 (D. Vt. filed Jan. 25, 1999) (emphasis added). Radoncic *voluntarily surrendered* to serve his sentence on February 23, 1999.

Because of the conviction, the Immigration Judge presiding over Radoncic's deportation proceedings found him to be "ineligible for asylum, but potentially eligible for withholding of deportation."[4] On April 11, 2000, however, the Immigration Judge denied Radoncic's application for relief from deportation and ordered that he be removed to Serbia-Montenegro. Radoncic's appeal from that decision to the Board of Immigration Appeals ("BIA") is still pending.

On May 19, 2000, the Bureau of Prisons released Radoncic to the custody of the INS. An Immigration Judge denied Radoncic's request for a bail hearing, asserting that 8 U.S.C. § 1226(c)(1) deprived him of jurisdiction to consider the application during the pendency of his appeal. Radoncic's petition for a writ of habeas corpus asserting a violation of his constitutional right to due process of law was filed on August 28, 2000. This Court held a hearing on September 7, 2000.

CONSTITUTIONALITY OF § 1226(c)

Section 1226(c) provides, in relevant part:

> The Attorney General shall take into custody any alien who—. . . is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title . . . when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense. . . .

---

[4] Aside from the alien smuggling, Radoncic has not been charged with any offense while in this country.

8 U.S.C. § 1226(c)(1)(B). Section 1227(a)(2)(A)(iii) provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). The alien smuggling for which Radoncic was convicted is an "aggravated felony" for purposes of this section. *See* 8 U.S.C. § 1101(a)(43)(N). Section 1226(c) thus allows or, arguably, requires the INS to hold Radoncic without bond during the pendency of his removal proceedings. Radoncic contends that the invocation of 8 U.S.C. § 1226(c) to deny him a bail hearing violates his right to procedural and substantive due process.[5]

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Even an excludable alien is a "person" for purposes of the Fifth Amendment and is therefore entitled to due process. *See Chi Thon Ngo v. INS*, 192 F.3d 390, 396 (3d Cir. 1999) (citing *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 41 L.Ed. 140 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments], and . . . even aliens shall not be . . . be deprived of life, liberty,

[5] Although the only two circuit courts to have considered the constitutionality of § 1226(c) have upheld the statute, *see Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999); *Richardson v. Reno*, 162 F.3d 1338, 1363 n. 119 (11th Cir. 1998), *vacated on other grounds*, 526 U.S. 1142, 119 S. Ct. 2016, 143 L.Ed.2d 1029 (1999), a number of courts, including two in this Circuit, have found it unconstitutional, *see Koita v. Reno*, 113 F. Supp.2d 737 (M.D. Pa. 2000); *Bouayad v. Holmes*, 74 F. Supp.2d 471 (E.D. Pa. 1999), *appeal dismissed*, No. 00-1111 (3d Cir. filed Oct. 23, 2000); *see also Welch v. Reno*, 101 F. Supp.2d 347 (D. Md. 2000); *Chukwuezi v. Reno*, NO. CIV. A. 3:CV-99-2020, 2000 WL 1372883 (M.D. Pa. May 16, 2000).

or property without due process of law.")); *see also Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Ma v. Reno*, 208 F.3d 815, 825 (9th Cir. 2000) ("[N]umerous cases establish that once an alien has 'entered' U.S. territory, legally or illegally, he or she has constitutional rights, including Fifth Amendment rights."), *cert. granted*, — U.S. ——, 121 S. Ct. 297, ___ L.Ed.2d ___ (2000).

Although district courts have split over the question of whether indefinitely foreclosing any possibility of release during the pendency of removal proceedings violates an alien's right to due process of law, this Court adopts the reasoning so well expressed by Judge Katz in *Bouayad v. Holmes*, 74 F. Supp.2d 471, 474-76 (E.D. Pa. 1999), *appeal dismissed*, No. 00-1111 (3d Cir. filed Oct. 23, 2000), and finds the mandatory detention provisions of § 1226(c) to be unconstitutional. *See also Koita v. Reno*, 113 F. Supp.2d 737, 741 (M.D. Pa. 2000).[6]

Moreover, the reasoning of *Chi Thon Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999), inexorably leads to the con-

---

[6] As noted *supra* note 5, numerous courts have concluded that § 1226(c) implicates fundamental liberty interests, and that detaining an alien indefinitely without affording him or her any opportunity to challenge the necessity of detention is unconstitutional. *See, e.g., Son Vo v. Greene*, 109 F. Supp.2d 1281 (D. Colo. 2000); *Welch v. Reno*, 101 F. Supp.2d 347 (D. Md. 2000); *Bouayad v. Holmes*, 74 F. Supp.2d 471 (E.D. Pa. 1999); *Rogowski v. Reno*, 94 F. Supp.2d 177 (D. Conn. 1999); *Danh v. Demore*, 59 F. Supp.2d 994 (N.D. Cal. 1999); *Van Eeton v. Beebe*, 49 F. Supp.2d 1186 (D. Or. 1999); *Martinez v. Greene*, 28 F. Supp.2d 1275 (D. Colo. 1998); *Chamblin v. INS*, No. 98-97-JD, 1999 WL 803970 (D. N.H. June 8, 1999).

clusion reached here. In *Chi Thon Ngo*, the Third Circuit considered whether the indeterminable detention of an alien subject to a final order of exclusion pending his ultimate deportation violates the alien's right to due process, and held that

> excludable aliens with criminal records as specified in the Immigration Act may be detained for lengthy periods when removal is beyond the control of the INS, *provided that* appropriate provisions for parole are available. When detention is prolonged, *special care must be exercised so that the confinement does not continue beyond the time when the original justifications for custody are no longer tenable.* The fact that some aliens posed a risk of flight in the past does *not* mean they will forever fall into that category. Similarly, presenting danger to the community at one point by committing crime does not place them forever beyond redemption. Measures must be taken to assess the risk of flight and danger to the community *on a current basis.* The stakes are high and we emphasize that grudging and perfunctory review is not enough to satisfy the due process right to liberty, even for aliens. . . . . The process due even to excludable aliens *requires* an opportunity for an evaluation of the individual's *current threat* to the community and his risk of flight.

Id. at 398 (footnote omitted, emphasis added). If an alien who is subject to a *final* removal order is constitutionally entitled to an individualized assessment of the risk of flight and danger to the community on a current basis, then *a fortiori,* an alien who is not yet

subject to a final removal order must be accorded the same opportunity. *See Bouayad*, 74 F. Supp.2d at 475.[7]

Respondent suggests that *Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993), stands for the proposition that the indefinite detention of an alien who has been convicted of an aggravated felony does not implicate a fundamental liberty interest. Contrary to Respondent's suggestion, however, the Supreme Court has not addressed whether deportable aliens have a fundamental liberty interest in being free from indefinite detention. In *Flores*, a class of minors challenged an INS regulation that requires juvenile aliens to be placed in institutional group care facilities during the pendency of deportation proceedings if a guardian or adult relative is not available to take custody. The Court recognized that strict scrutiny applies "when

---

[7] In *Chi Thon Ngo*, the petitioner was subject to a final removal order, but remained detained in the United States indefinitely because his native country, Vietnam, refused to accept him. Here, Radoncic's order of removal is not final because the BIA has not yet ruled on his appeal. During the September 7, 2000 hearing, Radoncic represented to the Court that the BIA had not yet issued a briefing schedule and that he does not know when it will render a decision on his appeal. Respondent represented that the Government does not know whether, if the appeal is denied, Radoncic's native country will accept him. Thus, although the facts of *Chi Thon Ngo* differ in some ways from those presented here, both cases deal with indeterminable detention, and the factual differences thus do not compel different results.

Moreover, the Court finds it significant that unlike *Chi Thon Ngo*, this case involves a detainee who might eventually be granted relief from deportation. Indeed, Judge Sessions of the United States District Court for the District of Vermont *expressly found* that Radoncic is *not a dangerous person and strenously recommended that he not be deported* upon completion of his sentence.

fundamental rights are involved," *see id.* at 302, 305, 113 S. Ct. 1439, but it rejected the minors' substantive due process claim because it found that no fundamental right existed under the circumstances of the case. *See id.* at 305, 113 S. Ct. 1439. The Court characterized the interest at stake as "the alleged interest in being released into the custody of strangers." *Id.* at 305, 113 S. Ct. 1439.

Moreover, the Third Circuit has held that "[e]ven an excludable alien is a 'person' for purposes of the Fifth Amendment and is thus entitled to substantive due process." *Chi Thon Ngo v. INS,* 192 F.3d 390, 396 (3d Cir. 1999). Although the *Chi Thon Ngo* court expressly limited its holding to excludable aliens and expressed no view on situations involving deportable aliens, *see id.* at 398 n. 7, there is no reason why an excludable alien would be entitled to greater protection than a deportable alien: "Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Landon v. Plasencia,* 459 U.S. 21, 32, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982). "In fact, several recent district courts have found, in detention contexts, that deportable aliens are entitled to *greater* substantive due process than excludable aliens." *Kay v. Reno,* 94 F. Supp.2d 546, 553 (M.D. Pa. 2000) (emphasis added) (citing cases). Consequently, the Court rejects Respondent's suggestion that the indefinite detention of Radoncic does not implicate fundamental liberty interests. *Cf. Welch v. Reno,* 101 F. Supp.2d 347, 353-54 (D.Md. 2000) ("This court joins those that have rejected the application of *Flores* to section [1226(c)]" (citing *Van Eeton v. Beebe,* 49 F. Supp.2d 1186, 1189 (D. Or. 1999); *Danh v. Demore,* 59 F. Supp.2d 994, 1003 (N.D.

Cal. 1999); *Martinez v. Greene*, 28 F. Supp.2d 1275, 1281 (D. Colo. 1998)).

Although Radoncic does not have an absolute right to remain at liberty while the removal proceedings are pending, due process requires a current individualized evaluation to determine whether his continued indefinite detention is necessary to prevent a risk of flight or a threat to the community.[8] An Order follows.

ORDER

AND NOW, this 8th day of November 2000, IT IS ORDERED that the petition for a writ of habeas corpus under 28 U.S.C. § 2241 is GRANTED as follows:

1. Petitioner is to be RELEASED from custody unless Respondent commences an individualized evaluation, including an individual hearing and decision within thirty days, to determine whether the continued detention of Petitioner is necessary to prevent risk of flight or danger to the community.[1]

2. If Petitioner demonstrates that he is not a threat to the community or a flight risk, Respondent immedi-

---

[8] "While the risk of flight by aliens may be significant, the public can still be protected by a careful evaluation of an individual alien's case, which should result in the detention of those who are likely to flee." *Bouayad v. Holmes*, 74 F. Supp.2d 471, 475 (E.D. Pa. 1999). "To presume dangerousness to the community and risk of flight based solely on his past record does not satisfy due process." *Chi Thon Ngo v. INS*, 192 F.3d 390, 398-99 (3d Cir. 1999).

[1] "In undertaking this review, the INS is reminded that 'grudging and perfunctory review is not enough to satisfy the due process right to liberty, even for aliens.'" *Bouayad v. Holmes*, 74 F. Supp.2d 471 (E.D. Pa. 1999) (quoting *Chi Thon Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999)).

ately shall order him released from custody on bond upon reasonable conditions.

3. So long as Petitioner remains in INS custody, the procedure set forth in paragraph 1 hereof shall be repeated every nine months if he so requests.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHUCH, VIRGINIA 22041

File Nos.: A73 181 457 and A73 181 456
— New York

IN THE MATTERS OF RADONIC, SADRIJA, AND
RADONIC, ZENIDA, RESPONDENTS

IN DEPORTATION PROCEEDINGS

[Nov. 13, 2001]

APPEAL

ON BEHALF OF RESPONDENTS: James J. Orlow, Esquire

ON BEHALF OF SERVICE: Kent J. Frederick
District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - Entered without inspection (both respondents)

Sec. 241(a)(1)(E)(i), I&N Act [8 U.S.C. § 1251](a)(1)(E)(i)] Smuggling aliens (A73 181 457 only)[1]

---

[1] The Immigration Judge did not address this charge in his April 11, 2000, written decision, and therefore it has not been sustained.

APPLICATION: Asylum; withholding of deportation; relief pursuant to the Convention Against Torture; voluntary departure

In a written decision dated April 11, 2000, an Immigration Judge found the respondents deportable pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act, denied their applications for asylum, withholding of removal, and relief pursuant to the Convention Against Torture, granted the female respondent's application for voluntary departure, and ordered the male respondent deported from the United State [*sic*]. The respondents, a husband and wife who are natives and citizens of Serbia-Montenegro (Federal Republic of Yugoslavia), have filed a timely appeal from that decision, challenging the denial of their applications for relief. The appeal will be dismissed.

The Immigration Judge determined that the male respondent had been convicted of a particularly serious crime and was therefore statutorily ineligible for asylum, withholding of deportation, and withholding of removal pursuant to the Convention Against Torture. We affirm the Immigration Judge's finding that he has been convicted of a particularly serious crime and is barred from those forms of relief. However, the respondent's conviction does not bar him from deferral of removal pursuant to the Convention Against Torture, and the Immigration Judge did not specifically address the merits of that application.

We have considered the male respondent's application for deferral of removal on appeal, and we first note that we agree with the Immigration Judge's finding that his testimony in these proceedings was in-

credible. In this regard, we find no error in the Immigration Judge's well-supported determination that the respondent submitted fraudulent documents in support of his applications for relief (I.J. at 17-19). Moreover, we have independently considered the record of proceedings and we find that he has failed to meet his burden of establishing that it is "more likely than not" that he will face torture if returned to Serbia-Montenegro. 8 C.F.R §§ 208.16(c)(2)-(4), 208.17. We therefore find that the male respondent has not met his burden of establishing eligibility for any form of relief from removal.

With respect to the female respondent, the only argument raised on appeal is that the Immigration Judge erred in denying her applications for relief. She has not meaningfully challenged the basis of the Immigration Judge's decision denying her applications. We have considered the record of proceedings, the Immigration Judge's decision, and her general contention on appeal. We conclude that the Immigration Judge adequately and correctly addressed the evidence presented below, and properly concluded that she failed to establish eligibility for asylum and withholding of deportation. Accordingly, we affirm those portions of the Immigration Judge's decision (I.J. at 13-15, 22-26). Furthermore, to the extent that the female respondent presented an application for relief under the Convention Against Torture, we find that she clearly failed to establish that it is more likely than not that she will face torture in Serbia-Montenegro. 8 C.F.R. § 208.16(c)(2).

Based on the foregoing, the following orders will be entered.

ORDER: The respondents' appeal is dismissed.

FURTHER ORDER. Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent Zenida Radoncic (A73 181 456) is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

/s/ EDWARD R. GRANT
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEW YORK, NEW YORK

File Nos.: A73 181 457 and A73 181 456

IN THE MATTERS OF RADONIC, SADRIJA, AND RADONIC, ZENIDA, RESPONDENTS

IN DEPORTATION PROCEEDINGS

[Apr. 11, 2000]

CHARGES: INA § 241(a)(1)(B)-Entry Without Inspection

APPLICATIONS: INA § 208(a)-Asylum (co-respondent only)

INA § 243(h)-Withholding of Deportation Withholding or Deferral of Removal pursuant to Article 3 of the Convention Against Torture (lead respondent only)

INA § 244(e)-Voluntary Departure

ON BEHALF OF THE RESPONDENTS:

Jan Allen Reiner, Esq.
350 Broadway Suite 200
New York, New York 10013-3911

ON BEHALF OF THE SERVICE:

Assistant District Counsel
New York District

DECISION AND ORDER
OF THE IMMIGRATION JUDGE

I. Procedural History

The lead respondent and co-respondent are a husband and wife, natives and citizens or Serbia-Montenegro, who entered the United States, at or near an unknown point along the Mexican border, on or about March 16, 1991, without inspection by an immigration officer. On November 23, 1993, the respondents affirmatively filed applications for asylum with the Immigration and Naturalization Service (the "Service"), which were referred by the Asylum Office to this Court. [Exhibit 2]. Subsequently, on March 11, 1996, the Service issued Orders to Show Cause, charging the respondents with deportability pursuant to INA § 241(a)(1)(B) (Entry Without Inspection). [Exhibits 1A and 1B].

On July 24, 1996, the respondents appeared at a master calendar hearing and through counsel, conceded proper service of the Orders to Show Cause, admitted the four factual allegations contained therein,[1] and conceded deportability as charged. Accordingly, deportability was established by clear, convincing, and unequivocal evidence. *Woodby v. INS*, 385 U.S. 276

[1] The Orders to Show Cause were amended at this hearing to reflect that the respondents are natives and citizens of Serbia-Montenegro, not Yugoslavia.

(1966); 8 C.F.R. § 242.14(a). As relief from deportation, the respondents requested asylum, withholding of deportation, and voluntary departure in the alternative, pursuant to INA §§ 208(a), 243(h), and 244(e), respectively. The lead respondent also seeks withholding or deferral of removal pursuant to Article 3 of the Convention Against Torture ("CAT"). The case was reset for an individual hearing on September 25, 1997.

On August 15, 1996, the lead respondent was taken into custody by the U.S. Border Patrol, and detained without bond in the Franklin County Jail in St. Albans, Vermont, on charges of alien smuggling. On August 25, 1997, the Service filed a motion for adjournment, requesting that the respondents' case be rescheduled for a hearing on or after February 1, 1998. The Service noted that the lead respondent was being prosecuted by the U.S. Attorney's Office in Burlington, Vermont, and that the criminal trial in the matter would begin in October. Because the outcome of the criminal trial would affect the lead respondent's eligibility for relief, the Service requested that the hearing be adjourned. The Court granted the Service's request, and a hearing was reset for March 4, 1998.

On March 4, 1998, the Court noted that the lead respondent was convicted, in the United States District court for the District of Vermont of Smuggling Aliens into the U.S., in violation of 8 U.S.C. § 1324(a)(I)(A)(i), and of Conspiracy to Smuggle Aliens into the U.S., in violation of 18 U.S.C. § 371. [*See* Exhibit 25, respondent's certificate of conviction]. The Court also noted that the lead respondent would be sentenced at a later date. Due to his conviction, the lead respondent was

found to be ineligible for asylum,[2] but potentially eligible for withholding of deportation. An individual hearing was set for April 20, 1998.

On April 20, 1998, the lead respondent testified in support of his applications for relief. At that hearing, the following documents were marked into evidence:

Exhibit 1 A: Lead respondent's Order to Show Cause.

Exhibit 1B: Co-respondent's Order to Show Cause.

Exhibit 2: Lead respondent's Form I-589.

Exhibit 3: Grand Jury Indictment for the lead respondent's case in the U. S. District Court for the District of Vermont.

Exhibit 4: Group exhibit, submissions A-T: background information relating to the respondents, such as copies and translations of their birth certificates, as well as State Department Country Reports of Human Rights Practices for Serbia-Montenegro. (Note: Exhibits I, K, and L, copies and translations of Serbian conviction certificate and judgment relating to the lead respondent were marked for identification purposes only). [Submitted September 15, 1997].

Exhibit 5: Lead respondent's affidavit, executed on March 3, 1998.

---

[2] Pursuant to INA 208(d), an alien who has been convicted of an aggravated felony may not apply for or be granted asylum.

Exhibit 6: Group exhibit, submissions A-M: affidavits from other Muslim natives of Serbia-Montenegro, acquainted with the lead respondent, as well as Grand Jury and trial testimonies of several witnesses, newspaper articles, and notes of Asylum Officer. [Submitted April 7, 1998].

Exhibit 7: Group exhibit, submissions A-I: background materials relating to the human rights situation in the former Yugoslavia, including reports by Helsinki Watch, Human Rights Watch, and Department of State Reports. (Submitted April 10, 1998).

Exhibit 8: Department of State Report: Serbia-Montenegro: Profile of Asylum Claims and Country Conditions (April 1997).

Exhibit 9: Asylum Officer's handwritten notes.

Exhibit 10: Letter from Consular Officer in U.S. Embassy in Skopje, Macedonia (dated March 31, 1998).

Exhibit 11: Maps showing the various republics of the former Yugoslavia, in particular the Sandzak region, and the respondents' hometown of Gusinje.

On April 30, 1998, the hearing resumed, and the lead respondent completed his direct testimony. On that date, the following exhibits were marked into evidence:

Exhibit 12: Group exhibit, submissions A-K: a package of background information,

including excerpts and a statement from Dr. Paul Mojzes, expert witness.

Although the Service began its cross-examination of the lead respondent on April 30, 1998, it completed its questioning on July 27, 1998. In addition to the lead respondent, three other witnesses testified before the Court. They were: Dr. Paul Mojzes, Mr. James Curtin and the lead respondent's wife, Mrs. Radoncic. On that date, the following exhibits were marked into evidence:

Exhibit 13:	Transcript of the testimony of Daniel Dragovich at the lead respondent's Vermont Trial.
Exhibit 14:	Application for car insurance completed by the lead respondent
Exhibit 15:	Group exhibit: the government's trial exhibits in the Vermont case.
Exhibit 16:	Depositions relating to the Vermont case.
Exhibit 17:	Statement of Blazenka Kartelo to Canadian authorities.
Exhibit 18:	Group exhibit: package of documents including receipts from travel agencies, and American Express, showing tickets purchased by the lead respondent.
Exhibit 19:	Not entered into the record.
Exhibit 20:	Form I-213 (Record of Deportable Alien) for Esmina Balic.
Exhibit 21:	Form I-213 for Sahrudin Radoncic.

The co-respondent, Mrs. Radoncic, testified in support of her asylum claim on June 7, 1999, and July 19, 1999. On June 7, 1999, the following documents were marked into evidence:

Exhibit 22:	Not entered into the record.
Exhibit 23:	Additional letter from Consular Investigator in U.S. Embassy in Serbia - Montenegro.
Exhibit 24:	Co-respondent's affidavit, executed November 20, 1998.
Exhibit 25:	Group exhibit: certificate of conviction for lead respondent, two Board decisions on issue of withholding, and additional background materials.
Exhibit 26:	Group exhibit, submissions A-G: memorandum of law submitted by respondent's counsel, sentencing report from Vermont trial, as well as other background materials.

All of the aforementioned documents, as well as the in-court testimony of the respondents and other witnesses have been carefully evaluated by this Court in reaching its decision.

II. Statement of Facts

A. Lead Respondent's Testimony

The lead respondent testified, in Serbo-Croatian, regarding his applications for relief on three separate dates: April 20, 1998, April 30, 1998, and July 27, 1998. The following is a summary of his testimony.

1. Respondent's testimony on direct examination

The respondent was born on February 15, 1960, in Gusinje, Montenegro. Gusinje is located in the Sandzak. A "historically defined area falling partly in Serbia and partly in Montenegro with a large concentration of 'ethnic' Muslims, who although Slavs, are regarded as a separate ethnic group." *See* Exhibits 8 and 11. According to the respondent, the population of his hometown of Gusinje is predominantly Muslim. The respondent testified that prior to his departure from Serbia-Montenegro, Gusinje had a population of 3,000, but today, only 1,000 people live there. Gusinje is located near the Albanian border, and the respondent stated that he has relatives who live both in Kosovo and in Albania.

The respondent is Muslim, but he was not particularly observant while growing up. The respondent attended primary school in Gusinje and high school in Titograd (now Podgorica), the capital of Montenegro. Upon graduating from high school in 1979, the respondent attended university in Belgrade, where he obtained a degree in electrical engineering. He attended university for five years, although he interrupted his studies from 1983 until 1984, to serve in the army. The respondent asserted that when he attended school during Tito's rule, he did not encounter any significant problems as a result of being Muslim.

The respondent testified that relations between the various ethnic groups in the former Yugoslavia began to deteriorate towards the end of his university studies. Upon graduation, the respondent remained in Belgrade, where he sought employment. He was not able to find a regular, full-time job in his field, and instead,

supported himself through odd jobs at offices and factories. The respondent believes he was unable to find employment because he is Muslim. He believes that he was discriminated against because went to several interviews, which never led to offers, though he was qualified for the position. When he inquired with Serb friends what the reason for his difficulties in finding employment could be, they would tell him that it is because he is Muslim. The respondent alleges that his religion is apparent because of his name, especially his first name. His mother and father's names are Fatima and Ismail, which are also known to be Muslim names.

The respondent testified, in detail, about changes that he began to observe in the former Yugoslavia, after Slobodan Milosevic, an ardent Serb nationalist, became the Communist party leader in Serbia around 1987. For example, he recounted conversations he had with Serbian friends, who told him that Milosevic had plans for a greater Serbia, which had "no room for Muslims, Croats, or Albanians." He also stated that ethnic tensions began manifesting themselves more openly; for example, when traveling between the various republics, it became common to encounter problems with Serbian soldiers who set up barricades and check points along the roads, and threatened and harassed anyone who was not Serbian. The respondent also described the changes he observed on visits back to his hometown of Gusinje. He testified, for instance, that Muslims were "laid off" and replaced by Serbs in both the police force, and in local government offices.

The respondent's personal problems with Serb authorities began in April of 1990, when he received a

draft notice while living in Belgrade. He testified that at that period, there were reports of skirmishes and "border incidents" taking place in other republics, such as Slovenia and Croatia. The respondent asserted that the war in Slovenia started at the very end of 1989, and ended after approximately one month in January 1990, and that the war in Croatia started soon after.

The respondent stated that he ignored the draft notice, because he did not wish to join the army for two reasons. First, based on the changes he observed with the rise of Serb nationalism and what he had heard, he was apprehensive, as a Muslim, to join the Yugoslav People's Army. He believed that Muslims were expendable, and would be the first ones sent to be killed. Second, the respondent felt that in joining the army, he would be "fighting against [his] own people." He stated that he would not have had a problem serving, had he been called upon to defend the territorial integrity of Yugoslavia against an outside invader. However, the purpose of this war was to build a greater Serbia, and in so doing, the respondent would have to fight against other Muslims, as well as Croats, Macedonians, Slovenians, and he felt that he could not do so.

The respondent testified that one early morning in May of 1990, the police came to his apartment, and took him to the police station on twenty-ninth of November street, in the old city of Belgrade. He was locked in a small cell. After some time, an officer came and asked him why he failed to appear in response to the draft notice. The respondent stated that he did not believe that the aim of this war was to protect Yugoslavia. The officer reacted by slapping him across the face and warned him, "you will see what will happen to you."

He was kept in that cell over night, and the next day, he was driven in a jeep to court. When he entered the courtroom, he only saw a judge, the prosecutor, a transcriber, and two police officers. The prosecutor told the judge that the respondent was engaged in "hostile activity" against the state, and did not respond to a call to protect Yugoslavia, even though the state paid for his education and gave him his credentials. The respondent testified that the prosecutor laughed as he addressed him as "Sadrija Radoncic, of father Ismail and mother Fatima," in order to emphasize that he was Muslim, and thus against Serbia, and also to humiliate him. The respondent was not given the opportunity to contact an attorney. He was not asked any questions. He was sentenced to four months imprisonment, and was taken to prison directly. He was not even given the opportunity to contact his family to inform them about what had occurred. The respondent has submitted a conviction certificate, issued by a municipal court in Belgrade, which allegedly certifies that the respondent was sentenced to four months imprisonment, "for the crime committed against the Socialist Federal Republic of Yugoslavia, on the basis of article no. 131 of the Penal Code." [*See* Exhibit 4, Submission 1-I.D. purposes only]. The respondent claims that a Serbian friend with connections obtained a copy of this document for him. When the Court inquired whether his friend risked trouble with the authorities in so doing, the respondent stated that there were no "adverse consequences for a Serb."

After being taken to prison, the respondent was led to a cell, where he was beaten by two officers. They hit him with clubs in his back and abdomen. The respondent testified that he was routinely beaten while in

prison. He was fed only once a day, if at all. The respondent stated that the worst part of his experience was that at night, he could not fall asleep. Drunken guards wearing Chetnik symbols would come into his cell, spit on him, curse at him, and beat him. Sometimes, after he had fallen asleep, they would throw cold water at him to wake him up. The guards would humiliate him by asking him if he would like them to build him a mosque in the prison, or if he had ever had a Serbian girlfriend. Sometimes, they would force the respondent to sing Chetnik songs, and to eat pork. The respondent testified regarding one particular incident when a man, accompanied by two guards, came into his cell and interrogated him about membership in the S.D.A.[3] He then beat the respondent for approximately thirty minutes and threw cold water at him.

The respondent developed a cough and high fever, and began to feel very ill. He testified that the guards began to notice that he was ill, and took him to the hospital. Thus, the respondent was released from prison sooner than he expected. He remained in the hospital for three weeks. After being released from the hospital, the respondent went to stay with a friend in Belgrade. He stayed in Belgrade for a few days, but did not feel safe there. He decided to return to Gusinje.

Shortly after his return to Gusinje, the respondent was stopped on the street by two policemen. They took him to the police station where he was interrogated by the chief of the station. He was told that they were

---

[3] The S.D.A., or Party of Democratic Action, is a Bosnian-dominated party, and is one of the leading parties in Bosnia and Herzegovina. *See* Department of State *Country Reports on Human Rights Practices for 1998-Volume II*, p. 1166.

aware of what had happened to him in Belgrade, and they questioned him about his membership in the S.D.A. The respondent explained that although the S.D.A. was headquartered in Bosnia, it had representative offices in various towns in the Sandzak, such as Gusinje and Plav. He added that because people of the Sandzak, like Bosnians, are predominantly Muslims, the Serbian officials were wary of the S.D.A. and the possibility of it extending its influence over the Sandzak. The respondent was held at the station for approximately four hours.

The respondent testified that while in Gusinje, he often met with people in different cafes, and told them about what was happening in the country. He added that because of his higher education, he was held in high regard by members of the community, who looked to him for information about the latest developments. The respondent discussed Milosevic's plans for a greater Serbia, and his concern that ethnic cleansing of Muslims would spread to all of the former Yugoslavia.

According to the respondent, the police became aware of these discussions. One late evening, as he and a friend were returning from a café, two police officers stopped them. They asked the respondent to come to the station with them. When the respondent asked if he could go home to let his family know about it, one of the officers hit him in the stomach, while the other tied his hands behind his back. The respondent was taken to the police station and locked up. In the meanwhile, his friend who had managed to get away, went to the respondent's home to let his father know what had happened. The respondent's brother and father came to the police station to inquire about him. However, by

the time they arrived, the officers were releasing the respondent. Apparently, they had only picked him up to warn him against "disseminating propaganda and agitating against Yugoslavia."

The respondent testified regarding another incident of detention and questioning which occurred in the middle of February of 1990. This time, the respondent stated that he was questioned about the activities of one of his cousins, who had also previously served in the Yugoslav People's Army, but was residing in Germany. The police wanted to know if the respondent knew anything about his cousin selling arms to Bosnians. The respondent stated that he knew nothing about the matter.

After this last incident, the respondent decided that he had to leave the country. He realized that he would not be left alone by the Serbian authorities. He thought that he would either be killed at the hands of Serbian authorities, or sent to the front lines and killed. So, he took steps to leave. The respondent stated that he had been issued a passport in Montenegro twice previously. While his first passport had expired, his second passport was "canceled." The passport with which he traveled was obtained for him by a man from Belgrade named Zeljko Masovich, who was paid 500 German Marks by the respondent's brother. The respondent did not use that passport to leave Serbia-Montenegro, because he left by walking over the border to Albania. From Albania, he flew to Frankfurt Germany, then to Mexico, and from Mexico, he entered the United States without inspection.

The respondent stated that approximately five to six months after his arrival in the United States, he began

engaging in activities aimed at increasing awareness of the war in the former Yugoslavia and Milosevic's plans to create an ethnically pure greater Serbia. He would meet other Muslims from the former Yugoslavia in various social clubs, and discuss the latest happenings with them. He organized and participated in demonstrations which took place before the United Nations and the Yugoslav Embassy in New York City. He also began collecting money which was to be sent to victims of the war. For example, when the Bosnian president, Alija Izetbegovic spoke before the United Nations in 1992, the respondent was among those who met with him. [*See* Exhibit 4, submissions N and O, statement by Dr. Dzernaludin Harba, former president of the American Bosnian Relief Fund, and photographs]. The respondent believes that the Serbian authorities are aware of these activities. For example, he contends that many photographs were taken when he was demonstrating in front of the Embassy, which would show that he was present there. He further alleges that other Muslims from the Sandzak who have returned to the area have been questioned about their participation in such demonstrations, but were spared because they were United States citizens. The respondent believes that if he were to return to Serbia-Montenegro, he would be detained, tortured, and possibly killed not only based on his previous "record," but also because of the political activities in which he has engaged while living in the United States. He submitted another certificate issued by a municipal court in Berane, which states that the respondent was convicted, *in absentia*, to three years in prison for the "offence[*sic*] of threatening the territorial integrity" of Yugoslavia in order to bolster his claim that the Serbian authorities are aware of who he is, and that he

is "wanted" there. [*See* Exhibit 4, submission L-I.D. purposes only].

The respondent stated that in 1993, he was arrested near Detroit Michigan, when he and three friends went to "pick up" a group of people who "were coming legally with visas from Canada to the United States." He added that he later discovered that in fact, none of them had visas. However, the respondent contends that at the time he went to pick them up, he believed they were entering the United States legally. The respondent was not convicted based upon this Michigan arrest.

The respondent testified that he was convicted in Vermont, because he paid for two airline tickets for two individuals to travel from Frankfurt, Germany to Montreal, Canada. The respondent testified, at length, about his purpose in helping these individuals enter the United States. He insisted that his aim was humanitarian, and that he was only saving people whose lives were in danger in the former Yugoslavia, and helping their concerned family members in the United States be reunited with them. He claims that did not profit from these ventures, but in fact lost money. He also stated that he accepts responsibility for what he did, regrets it, and would never attempt to smuggle individuals into the United States again.

2. Respondent's testimony under cross-examination

Under cross-examination, the respondent admitted that he has been arrested three different times because of his attempts to bring aliens to the United States- once near Detroit, Michigan, once in Champlain, New York, and once in Vermont. Regarding the New York

arrest, the respondent stated that he and his brother-in-law, drove to New York to retrieve three of his relatives at the border. They drove in the respondent's wife's car, which was subsequently confiscated by the border police. The car in question is a 1990 Mercedes, which the respondent purchased for $16,000. The respondent testified that since living in United States, he has had various jobs; he has been a doorman, worked in a hotel, driven a cab, and worked in construction. His annual income, on average, has been somewhere between $25,000 to $30,000. The respondent's own car is a Lincoln, which he purchased for $6,000 in cash. He pays $750/month in rent, and owns no other property.

The respondent stated that when he and three friends traveled to Detroit to pick up a group of aliens, he spent approximately $150 to $200 on gas and food. However, he was carrying $40,000, which was money collected from the Muslim Yugoslav community who made voluntary contributions. That money was to cover the cost of tickets, lodgings, and food for the aliens who were to enter the United States. The respondent specified that the tickets were airline tickets for travel between Europe and Canada for fifteen or sixteen individuals. He added that a Canadian citizen of Croat ethnicity and her husband had already purchased those tickets, and he was simply reimbursing them.

The respondent was asked if, when in Michigan, he spoke to a woman named Blazenka Kartelo. He replied that he had spoken with her before, but not in Michigan. He stated that she is the Canadian citizen of Croat origin he previously mentioned, and that she and her husband were helping individuals leave the former

Yugoslavia to save their lives. He added that he was not absolutely certain if Ms. Kartelo was behind the arrangements for the fifteen Serbian nationals to travel to Canada. However, he testified that he spoke to Ms. Kartelo a few days prior to his own trip to Michigan to discuss the delivery of money for tickets and accommodations. In Detroit, the respondent paid a Mr. Valentik a sum of approximately $6,000. The respondent stated that he believes Mt. Valentik works for the Kartelos.

When asked if he knew an individual named Daniel Dragovich, the respondent stated that he met him, and later discovered that he was employed as a Canadian immigration official. Mr. Dragovich was present in the Ambassador Hotel, near Detroit, in April of 1993, when the respondent had a conversation with Mr. Valentik regarding the arrival of the aliens. [*See* Exhibit 13, testimony of Daniel Dragovich].

When asked about the tickets he purchased which led to the Vermont conviction, the respondent stated that those tickets were for travel from Frankfurt, Germany to Montreal, Canada. He testified that he paid for those with his American Express card, and that those are the only two tickets he purchased. When asked if he had ever heard of Louis Overseas Travel, the respondent stated that it is a travel agency in the Bronx. The respondent denied having purchased, in cash, two airline tickets from them in July of 1996. He added that his wife had not done so either. When informed that his wife's name was on an order form for two tickets from Louis Overseas Travel, the respondent stated that perhaps his wife had helped someone with the purchase of tickets, because she speaks better English.

The respondent testified regarding Mr. Glavinick, who works in the Pan Adriatic Travel Agency, the agency from which the respondent claims to have purchased two tickets. In the criminal trial in Vermont, Mr. Glavinick testified that the respondent bought an additional set of two tickets, which he paid for in cash. The other set of tickets were for travel from Yugoslavia to Moscow, with a stop-over in Germany. According to Mr. Glavinick's testimony in the Vermont trial, the respondent purchased two sets of two tickets, each set under different names. The respondent insisted that he only paid for two tickets with his American Express card. When asked if he had purchased two tickets for individuals named Markovic and Kandic, the respondent replied that he did not purchase tickets for individuals with those names. The respondent testified that he does not recall in whose names the two tickets were purchased. [*See* Exhibit 15].

The Service questioned the respondent about an application for insurance, completed by him in Texas. *See* Exhibit 14]. On this application, the respondent had provided an address in Texas as his home address. The application also indicates that the respondent has a Texas driver's license. When confronted with this information, the respondent replied that he went to Texas in 1996, and stayed with some cousins who lived there. The respondent's cousins owned a pizzeria. He went to Texas, with the intension of perhaps moving there, however, things did not "work out," and he returned after twenty days. The respondent stated that

his Texas driver's license was confiscated by the border patrol.[3 [sic]]

Lastly, the respondent was asked if he was aware of the Serbian government extending amnesty to draft evaders from the late 1980's and 1990's. The respondent testified that while he heard reports of such a thing, he does not trust the Serbian government, which has been known to say one thing and do another.

B. Testimony of Expert Witness

On July 27, 1998, the respondent's expert witness, Dr. Paul Mojzes testified before the Court. Dr. Mojzes is a professor of religious studies at Rosemont College in Pennsylvania. Although Dr. Mojzes' area of expertise is religion in Eastern Europe, his focus has been to study the history of the church-state relationship in the region. He has published several books and numerous articles on this subject. [*See* Group Exhibit 12, submissions A and B]. He has also traveled frequently to the various republics of the former Yugoslavia, and the Court finds that he is qualified to testify, based on his observations and knowledge regarding the religious/ethnic conflict in the former Yugoslavia.

Dr. Mojzes testified that since leaving the former Yugoslavia at the age of twenty-one, he has gone back on visits nearly every year. He has traveled extensively within the various republics of the former

---

3 [sic] The Service also called the respondent's wife to testify specifically regarding this issue. Mrs. Radoncic stated that she and her husband were briefly in Texas. She stated that they went to Texas with the intention of settling there, but moved back to New York. Mrs. Radoncic testified that her only driver's license was issued by New York State.

Yugoslavia. The main purpose of Dr. Mojzes' trips was to meet other academics in the region, and to keep abreast of the latest religious/political developments. He described one of his principal tasks as the collection of as much literature concerning the events of the mid to late 1980's and early 1990's as possible.

Dr. Mojzes testified regarding his observations during the years 1986 until 1990. He stated that as early as 1986-1987, there were "outbreaks" and "disturbances" that took place, but that newspapers were reluctant to conclude that ethnic tension was the reason behind such events. However, gradually, the papers started to mention not just the individuals who were behind assaults, or attacks, but also to impugn an entire ethnic group in their reporting, and to suggest that these were more than isolated incidents. Dr. Mojzes added that various papers from the different regions would readily be available in large cities such as Belgrade, so that the respondent could well have been aware of such events.

Dr. Mojzes stated that actual warfare broke out in Slovenia after Slovenia declared its independence in the summer of 1991, and lasted only two weeks. However, be added that a "low-intensity war" had begun in places such as Kosovo and Croatia as early as the mid-1980's. Therefore, he stated that though the respondent was incorrect in stating that formal war had broken out in Slovenia by late 1989, "violence was escalating rapidly and that there was a psychosis in the country that war might happen."

Under cross-examination, Dr. Mojzes was asked if he recalls any reports in the press regarding a draft in April of 1990. He replied that Yugoslavia had "universal conscription," and that as far as he knew, the

draft occurred regularly, nearly every month. He added that by 1989-1990, there was concern that there could be an inadequate number of recruits in the event of war, so that the Yugoslav People's Army began drafting from people in the reserves. Dr. Mojzes stated that he had no article or other document to corroborate this, but that it would also be highly unlikely for military matters to be openly published in the press. News regarding the draft or the military was generally obtained through friends.

When asked if he had any information about what happened to those who did not heed the draft, Dr. Mojzes stated that in his own family, a relative of Croat ethnicity refused to serve because he did not want to join the increasingly Serb army, and be forced to fight against other Croats. As a result of his refusal to heed the draft he was imprisoned. Dr. Mojzes testified that this relative was able to escape the former Yugoslavia before his trial. He added that he has no specific knowledge about what, on average, the prison term for refusal to serve in the army is.

C. Testimony of Service's Witness

On July 27,1998, the Service's witness, Mr. James Curtin, testified before the Court. Mr. Curtin has been employed with the United States border patrol as a supervisory special agent for twenty-one years. He described his duties as supervising the "anti-smuggling" unit, which investigates organized and commercial alien smuggling organizations.

Mr. Curtin began investigating the respondent's case in January 1996. He became involved in the case when a search of two aliens entering his unit's territory re-

vealed two airline tickets charged to the respondent's American Express card. The names of the two aliens apprehended at the border were Markovic and Kandic. However, they had entered Canada with tickets bearing different names.

Mr. Curtin stated that he obtained this information when he served American Express with a subpoena. Mr. Curtin's investigations also revealed that sixteen airline tickets, some of which had been paid for in cash, had been purchased from different travel agencies, namely Pan Adriatic and Louis Overseas Travel. Mr. Curtin also served the telephone company with a subpoena, and discovered that the respondent had placed frequent calls to these travel agencies. Of the sixteen airline tickets, the respondent had purchased six, although four of them had been voided. [*See* Exhibit 15].

Mr. Curtin's investigation led to interviews with other individuals, namely Blazenka Kartelo, who was "one of the principal subjects of the investigation in Detroit." [*See* Exhibit 17, Statement of Blazenka Kartelo to Canadian authorities]. He testified that he also interviewed Mr. Zufer Markovic, who told Mr. Curtin that he paid the respondent $5,000 to have his father smuggled into the United States.

Under cross-examination, Mr. Curtin admitted that at the criminal trial in Vermont, the government did not produce cash receipts from Louis Overseas Travel which would indicate whether the respondent had purchased any additional tickets. He added that agents from Louis Overseas Travel did not testify at the Vermont trial. Mr. Curtin added that neither Zufer, Markovic, nor Blazenka Kartelo testified at the

Vermont trial. When asked if he was aware of the fact that before the Grand Jury, Zufer Markovic denied knowing the respondent, Mr. Curtin stated that he was not at the Grand Jury, and he did not read a transcript of the Grand Jury testimony. [*See* Exhibit 6, Submission I-Grand Jury testimony of Zufer Markovic].

D. Co-Respondent's Testimony

The co-respondent, Mrs. Radoncic, who is relying on her own separate asylum claim, testified before the Court, in Serbo-Croatian, on June 7, 1999 and July 19, 1999. What follows is a summary of her testimony.

Mrs. Radoncic was born on May 10, 1969, in Gusinje. She is Muslim. She testified that after Tito's death in 1980, she began to notices [*sic*] things changing in her country. For example, she stated that Muslim teachers in school were replaced with Serbian teachers. She also recalled a Serbian principal telling the Muslim students that whoever attended the mosque, could not continue going to school. Mrs. Radoncic declared that similar restrictions were not placed on Serbian students.

Mrs. Radoncic attended nursing school in Kosovo, in the town of Kosovska, Mitrovica. She went to Kosovo in 1987, which was around the time when Milosevic delivered a speech in Kosovo Polje, in which he proclaimed that Kosovo had to be reclaimed by Serbs. Mrs. Radoncic testified that millions of Serbs heard Milosevic's speech, and to Muslims, it became clear that things would not be the same. There were changes in the police force, in managerial positions, and even in schools. For example, if a school principal had been Albanian, he was replaced with a Serb.

Mrs. Radoncic testified that while attending school in Kosovo, she felt that Muslim students and Serbian students were treated differently. She recalled that during Ramadan, the Serbian dormitory attended would not permit the Muslim students to leave the dormitory to buy bread to break their fast. According to Mrs. Radoncic, Serbian students were accommodated during their religious holidays.

Mrs. Radoncic visited her hometown of Gusinje periodically, however she testified that she avoided making the trip too often, because trips to the Sandzak became increasingly difficult as Serbian police began to routinely inspect the buses. She stated that the Serbian police would ask the passengers to show their ID cards, and that Muslims were easily identified by their last names. Sometimes, the Muslims were interrogated, and if anyone resisted, he would be harassed or beaten. However, the Muslims were powerless to do anything in face of the Serbian police.

After graduating from nursing school, Mrs. Radoncic completed a one-year internship at a medical center in Gusinje. After the internship, which she completed in 1989, Mrs. Radoncic searched for a job. She even applied to the same medical center in Gusinje, but was turned down. Mrs. Radoncic believes that she did not obtain the position because she is Muslim. She later discovered that a Serbian woman from Ivangrad (now Berane) got the position, even though she had to travel fifty kilometers to get to work. Mrs. Radoncic looked for jobs in Gusinje, Plav, and Ivangrad, with no success. She even looked, in vain, for jobs outside of her field.

Upon moving back to Gusinje, Mrs. Radoncic observed changes similar to those she observed in

Kosovo. For example, she testified that the first thing she noticed was that the police officers were now all Serb. Many of the authorities at the local administrative level were also replaced by Serbs. It became apparent to all that Milosevic was executing his plan to create a greater Serbia. Muslims were mistreated and harassed, and many began to disappear. The Serbian plan was to force Muslims to leave.

Mrs. Radoncic met her husband, the respondent, after she graduated from nursing school and returned to Gusinje. She and her husband were wed in a private ceremony at home, but never registered their marriage in Gusinje, because of the problems her husband had with the authorities after his return from Belgrade. Mrs. Radoncic testified regarding her husband's detention based on his refusal to serve in the army, and also regarding his various encounters with the police in Gusinje. Mrs. Radoncic's testimony regarding what happened to her husband is based on information he provided her. Mrs. Radoncic testified that she and her husband decided to leave their country to save their lives, and the life of their then unborn child.

Mrs. Radoncic also testified regarding her husband's activities in the United States, the meetings, the demonstrations, and the fund-raising. She and her husband both participated in a demonstration before the United Nations when Karadzic visited the United States. Mrs. Radoncic believes that if she and her husband were to return to Serbia, they would both be apprehended, detained, and tortured by the Serbian authorities. She is fearful of what the future would hold for her two children, both of whom were born in the United States.

[*See* Group Exhibit 4, submission D-birth certificates of the respondents' children].

Under cross-examination, Mrs. Radoncic testified that she was not a member of any organizations in her country. She also stated that although she was never arrested or detained, or physically harmed by the Serbian police, she had been harassed and intimidated and lived in constant fear.

When asked about the purchase of airline tickets from Louis Overseas Travel, Mrs. Radoncic stated that she has heard of the agency, but that she never personally purchased tickets there. She stated that her brother-in-law had purchased tickets from them.

When asked if she is aware of the efforts of the government of Montenegro to become a loose federation with Serbia, Mrs. Radoncic replied that although she heard about this, she did not believe it would happen. Mrs. Radoncic stated that she is also aware of the presence of international peacekeeping forces in her country, but she maintains that many people continue to lead insecure lives. She asserted that despite the international presence in the former Yugoslavia she fears returning to Serbia-Montenegro, and believes that Milosevic, who remains in power, will not desist from pursuing his goal of creating an ethnically pure greater Serbia.

III. Legal Standards

A. Asylum

A respondent facing deportation bears the evidentiary burdens of proof and persuasion in any

application for asylum under INA § 208(a). See 8 C.F.R. § 208.13(a); *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). A respondent seeking a discretionary grant of asylum must establish that he is a "refugee" within the meaning of INA § 101(a)(42)(A). The respondent must demonstrate that he is "unable or unwilling to return to, and is unable or unwilling to avail himself of the protection" of his home country because of past persecution, or a "well-founded fear of future persecution" on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 208.13. An applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear such persecution. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

In determining whether a respondent is eligible for asylum, the respondent's subjective mental state must be considered against the background of circumstances prevailing in his home country. The objective reasonableness of the respondent's fear can be based on what has happened to others similarly situated, as reported in current Department of State *Reports on Human Rights and Country Conditions* or other reliable sources. *Matter of Exame*, 18 I&N Dec. 303, 304-5 (BIA 1982). In some cases, the only available evidence of the respondent's fear is his own testimony. This may suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for the respondent's fears. *Matter of Mogharrabi, supra*, at 448. This does not mean that introducing supporting evidence is at the respondent's option. Generally, such evidence must be presented when available. *Matter of Dass*; 20 I&N Dec.

120, 124 (BIA 1989). This is particularly true when the basis of a respondent's claim are allegations of general country conditions in his home country. In such cases, corroborative background evidence may well be essential. Id. at 125; *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997).

In addition to establishing statutory eligibility, an applicant for asylum has the burden of establishing that a favorable exercise of discretion is warranted. *Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984). To meet this burden, the respondent should present evidence of any relevant factors which he believes support the favorable exercise of discretion in his case. *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). These factors include the character of the applicant and whether he has any relatives legally in the United States or other personal ties to this country which were the motivation to seek asylum here rather than elsewhere. *Id.* However, absent any adverse factors, asylum should generally be granted in the exercise of discretion. *Id.*

B. Withholding of Deportation

A respondent seeking withholding of deportation bears the burden of showing that his "life or freedom would be threatened in [his country of citizenship or last habitual residence] on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 243(h)(l); 8.C.F.R. § 208.16(b). In order to make this showing, the alien must establish a "clear probability" of persecution on account of one of the enumerated grounds. *INS v. Stevic*, 467 U.S. 407, 413 (1984). This "clear probability" standard requires a showing that it is more likely than not that the alien would be subject to persecution on account of one of the

enumerated grounds. *Id.* at 429-30. As such, it is a higher burden than that which is required to establish "well-founded fear," for the purposes of asylum. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987).

However, INA § 243(h)(2) states, in pertinent part, that any alien who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States" is ineligible for withholding of deportation. INA § 243(h)(2)(B). Paragraph (2) further states, "for purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime."

Section 413 (f) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (enacted April 24, 1996) ("AEDPA") amended INA § 243(h) to provide that the Attorney General may determine whether her discretion to withhold deportation should be exercised in favor of any alien in order to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.

The Board of Immigration Appeals (the 'Board") considered the effects of this provision on the aggravated felony bar in *Matter of Q-T-M-T-*, 21 I&N Dec. 639 (BIA 1996). The Board concluded that an alien who has been convicted of an aggravated felony or felonies and sentences to at least five years of incarceration was conclusively barred from withholding of deportation. However, an alien who was convicted of an aggravated felony or felonies and sentences to an aggregate of fewer than five years of incarceration would be subject to a rebuttable presumption that he had been convicted

of a particularly serious crime, which would bar eligibility from withholding. *Matter of Q-T-M-T-, supra.*

The holding in *Matter of Q-T-M-T-* continues to apply to cases initiated before April 1, 1997, which are not controlled by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat 3546 (effective date April 1, 1997) ("IIRIRA"). *See In re L-S-*, Int. Dec. 3386 (BIA 1999); *see also* 8 C.F.R. § 208.16(d)(3).

For purposes of applying INA § 243(h), in determining whether or not a particular aggravated felon, as defined in AEDPA, who has been sentenced to less than a five year period of incarceration, has overcome the presumption that he committed a particularly serious crime, the appropriate standard is whether there is any unusual aspect of the alien's particular aggravated felony conviction that convincingly evidences that the crime cannot rationally be deemed "particularly serious" in light of treaty obligations under the Protocol. *Matter of Q-T-M-T-, supra,*

C. Article 3 of the Convention Against Torture

In considering a CAT claim, the Immigration Judge must first determine whether the alien has established that it is more likely than not that he would be tortured if removed to the proposed country of removal. *See* 8 C.F.R. § 208.16(c)(4). Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimated him or a third person, for any

reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R § 208.18(a)(1).

Once the Immigration Judges determines that the alien has met his burden of proof and that the alien is not subject to the bars contained in INA § 241(b)(3)(B) (as amended), he must grant the alien withholding of removal. However, if the Immigration Judge decides that the alien met his burden of proof, but is subject to the bar contained in INA § 241(b)(3)(B), i.e., the alien is a persecutor of others, a security threat, or has been convicted of a particularly serious crime, he must deny the alien withholding of removal under CAT and grant the alien deferral of removal under 8 C.F.R. § 298.17. *See* 8 C.F.R § 208.16(c)(4).

IV. Analysis of the Lead Respondent's Claims

Before addressing the merits of the lead respondent's claims, the Court must make a threshold credibility finding. An Immigration Judge's findings of credibility of witnesses appearing before him are ordinarily given great weight. *Matter of Pula, supra.* Testimony is considered not credible when it is inconsistent, contradictory with country conditions, or inherently implausible. *Matter of S-M-J-, supra.* Inconsistencies and omissions regarding events central to an asylum claim may lead to an adverse credibility finding if these inconsistencies and omissions result in specific and cogent reasons for concluding that testimony is incredible, and a convincing explanation for them has not been supplied by the alien. *See, In re A-S-*, 21 I&N Dec. 1106 (BIA 1998). In addition, presentation of an identifi-

cation document that is found to be counterfeit not only discredits the applicant's claim as to the critical elements of identity and nationality, but, in the absence of an adequate explanation and/or rebuttal, also indicates an overall lack of credibility regarding the entire claim. *In re O-D-*, 21 I&N Dec. 1079 (BIA 1998).

In the instant case, the Court finds that the lead respondent has not been credible. The Court bases this finding, in large part, on the respondent's presentation of two fraudulent conviction certificates, which purport to establish that the respondent was twice convicted, once *in absentia*, of hostile activity against Yugoslavia. [Exhibit 4, Submissions I and L]. The respondent's submission of fraudulent documents which go to the heart of his claim has seriously undermined the entirely of his testimony in the eyes of this Court. *See Matter of O-D-, supra.*

The Service submitted a report written by a Consular Investigator in the anti-fraud unit of the United States Embassy in Serbia and Montenegro. [Exhibit 23]. In addition to the investigator's report, the Service has also presented a report writen by Djordje Djurisic, an attorney who has been in practice in Belgrade since 1959. [*Id.*]. With regard to the respondent's first alleged conviction document, both reports state that in the Belgrade court archives, a decision or verdict bearing the docket number that appears on the respondent's document does not exist. Mr. Djurisic identifies a number of facial irregularities on the respondent's second alleged conviction certificate. For example, the person whose name is cited as the presiding judge in the document has never been known to be a judge in that county, or even work in that court. Based on the

findings in these reports, the Court concludes that the respondent's conviction documents are fraudulent.

The respondent's attorney rigorously contests the findings in these reports.[4] For instance, he argues that the mere fact that the respondent's file regarding his first conviction was not found should not lead to an inference that the document is fraudulent He also contends that the Serbian government cannot be relied upon to verify either of the respondent's conviction documents, since its verification of these documents would go against its interests, by revealing to the world that the Serbian government tortured and imprisoned individuals who refused to serve in the military.

In response to these arguments, the Court notes that it is the respondent who bears the burden of persuasion with regard to his claim. 8 C.F.R. § 208. 16(b). This Court finds that he has failed to provide evidence or an explanation that is sufficient to rebut the Service's report, or to overcome the Court's concerns. Even if the Court were to discount the contents of the Consular report, aspects of the respondent's claim remain inherently implausible. The respondent's attorney alleges that the Serbian government would "intentionally deny the prosecution" of an individual such as the respondent. If this is true, the Court then questions how the respondent obtained these documents in the first place. In his testimony, the respondent stated that a Serbian friend obtained the documents. He added that as a Serb, his friend was not at risk by getting these documents. The Court is rather doubtful that at such a critical time, Serbian authorities would provide these

---

[4] The arguments are summarized in a Closing Statement, submitted to the Court on September 15,1999.

documents to "a friend," who was not an attorney or a relation of the respondent. It appears to the Court that the authorities would be highly suspicious of someone who requested the documents, especially if, as the respondent's attorney contends, they are apt to deny their prosecution of individuals for such "crimes."

Regardless, the second Consular response was not from the Serbian government, but from a defense trial attorney, Mr. Djurisic. Yet the private defense attorney also reached the conclusion that the document was fraudulent, and provided details and convincing reasons for reaching such conclusion. Thus, even if the Court accepts counsel's contention that the first consular report is unreliable because it was denied by Serbian government sources, such contention cannot rebut the findings of Mr. Djurisic's letter.

In addition, the Court finds it implausible that the respondent would be convicted, *in absentia*, for hostile activity against Yugoslavia and convicted to a nearly four-year term of incarceration. According to his testimony, the respondent was convicted and sentenced to a four month prison term for refusing to serve in the military. He then returned to Gusinje, where he discussed the political situation in the country with other Muslims. The respondent did not suggest that these were anything more than political discussions about the prevailing country conditions. For example, he did not testify that he and his friends contemplated organized action against the government, or a violent overthrow, or anything to this effect. He testified that he was detained and questioned regarding these discussions. After two or three such incidents, he decided to leave Yugoslavia in March of 1991. In March of 1994,

he was allegedly convicted, *in absentia*, for hostile activity against Yugoslavia. The Court regards the respondent's alleged conviction three years subsequent to his departure, with suspicion. There appears to be, based on the record, no real basis for such a conviction. The Court believes that the respondent has exaggerated his role as an "instigator," and that based on the evidence in the record, his *in absentia* conviction, notwithstanding the questionable conviction certificate, is inherently implausible. *Matter of S-M-J-, supra.*

Lastly, the Court notes that there exists a material inconsistency in the respondent's testimony. The respondent, representing himself as an educated man with connections, who was informed of the latest occurrences in the former Yugoslavia testified that the war in Slovenia began at the end of 1989, and had ended by January of 1990. However, both the Department of State report and the respondent's expert witness stated that the war in Slovenia began in July 1991. [*See* Exhibits 8 and 12]. Even when confronted with this information, the respondent insisted upon his account of the events. The Court finds this inconsistency to be yet another element which undermines his claim. *See Matter of A-S-, supra.*

In sum, the Court finds the respondent to be incredible. Based upon this adverse credibility, the Court also finds that he has failed to meet his burden of proof with regard to his applications for relief.

Notwithstanding the adverse credibility finding, this Court finds that the respondent is ineligible for withholding of deportation pursuant to INA § 243(h) and withholding of removal pursuant to Article 3 of CAT

because of his conviction for a "particularly serious crime." *See* INA § 243(h)(2)(B); 8 C.F.R. § 208.16(c)(4).

The respondent asserts that a "particularly serious crime" is defined, in large part, by the nature of the offense, as well as the sentence imposed and the underlying facts and circumstances of the case. *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). He then suggests that based on this standard, he was not convicted of a particularly serious crime. First, the respondent argues that he was not convicted of a "crime of violence," which are typically crimes involving force or causing harm to persons and property, and therefore his crime was not particularly serious. *See e.g. Matter of S-S-*, Int. Dec. 3374 (BIA 1999) (holding that an alien who was convicted of first degree robbery of an occupied home while armed with a handgun and sentenced to 55 months' imprisonment has been convicted of a particularly serious crime); *see also Matter Of L-S-J-*, 21 I&N Dec. 973 (BIA 1997) (holding that an alien who has been convicted of robbery with a deadly weapon and sentenced to two and a half years in prison has been convicted of a particularly serious crime). Second, the respondent contends that because he was sentenced to an eighteen-month period of incarceration, his crime cannot be deemed particularly serious. *See Matter of S-S-, supra; Matter of L-S-J-, supra.* Third, the respondent asks the Court to consider the underlying facts and circumstances of his case in making its adjudication. Specifically, the respondent asserts that he was motivated by a humanitarian desire to help other Muslims who were fleeing the former Yugoslavia. Therefore, he cannot be considered a danger to the community. Lastly, the respondent cites a Board decision, *In re L-S-*, Int. Dec. 3386 (BIA 1999), sug-

gesting that his case is analogous. In that case, the Board held that an alien who was convicted of bringing an illegal alien into the United States in violation of 8 U.S.C. § 1324(a)(2)(B)(iii) and sentenced to three and a half months' imprisonment has not been convicted of a particularly serious crime.

The Court believes that the facts of the instant case can be distinguished from those in *Matter of L-S-*. In *Matter of L-S-*, the respondent, who attempted to smuggle one person into the United States, had no prior smuggling offenses, and received a downward adjustment of his sentence for acceptance of responsibility. Consequently, he was sentenced to a three and a half month prison term. In the instant case, the respondent has been apprehended on three separate occasions for alien smuggling. One of his smuggling attempts alone involved at least fifteen or sixteen individuals. He received a sentence of eighteen months, which is significantly longer than three and a half months. Moreover, the sentencing judge noted that the respondent had not clearly demonstrated an acceptance of responsibility; nor was he entitled to a "not for profit" downward adjustment in his sentence. [*See* Exhibit 26, submission A, pp. 4, 17, and 30].

The respondent has repeatedly attempted to present himself as a humanitarian whose sole aim was to help people whose lives were in danger. However, the Court notes that all of the individuals whom the respondent attempted to smuggle to the United States entered this country through the Canadian border. It appears to the Court that if the respondent's primary concern had been the safety of these individuals, then their arrival in Canada would have sufficed to reassure

him that they were out of danger. In fact, they would have had the right to apply for asylum in Canada under laws that are perhaps more liberal than in this country. Additionally, the flights to Canada originated not from Serbia, but from Germany. The individuals whom the respondent claims to be saving were thus already out of Serbia, and thus safe from persecution, before the respondent ever became involved in transporting them. Evidence in the record suggests that the respondent received money to smuggle these persons into the United States. [*See* Exhibit 26, submission A, p. 22].

Therefore, the Court is unpersuaded by the respondent's account of his humanitarian motives.

In addition, the Court notes that the respondent has continually been evasive regarding the extent of his culpability in the alien smuggling that took place in Michigan and Vermont. For example, he testified that he believed that the aliens involved in the Michigan incident had visas to enter the United States legally. However, the respondent was arrested not once, but three separate times in three different states. Even if he did not understand that what he was doing was illegal on the first occasion, he was clearly on notice the second and third times. Also, the respondent admitted to purchasing tickets front Frankfurt to Montreal in names not belonging to the travelers. In using false names, he must have realized that the travelers were not coming to the U.S. legally. Also, the respondent himself had been smuggled to the U.S. illegally in 1991, crossing the border without inspection from Mexico. This fact of personal history makes it even more incredible that the respondent would not know that those he was assisting were entering illegally.

Moreover, the record contains a transcrript of testimony given by Daniel Dragovich, a Canadian immigration officer. [*See* Exhibit 13]. Mr. Dragovich's testimony describes the circumstances under which the aliens in the Michigan incident entered the country and met with the respondent. On pages 6-7 of his testimony, Mr. Dragovich testified that the respondent and three other men met the smuggler, a Steven Valentik, and Mr. Dragovich at a motel. The four men, including the respondent, greeted the smuggler as if he knew him. According to Mr. Dragovich, upon entering the room, "[o]ne of the individuals entered the wash room and checked it around, and one individual proceeded through the back door onto the balcony, looked around, came back into the room, and then turned the volume on the TV up."

Is this the behavior of innocents who merely believed they were picking up friends who had legally entered the country? The above clearly describes the behavior of seasoned criminals.

When questioned about his obtaining a Texas driver's license, the respondent became very evasive. He took a long time answering, each question on this topic, and gave answers that were intentionally vague and noncommittal to leave himself as much "wiggle room" as possible. The respondent was obviously untruthful with the court in that part of his testimony.

The INS Border Patrol Agent, James Curtin, testified that he witnessed the respondent calling two people out of the bushes near the border and then driving away with them. If the respondent genuinely thought the smuggled individuals were entering the U.S. legally, why would he be calling them out of the

bushes? Also, Mr. Cumin testified that he was told by one of the smuggled individuals that the individual had paid the respondent $5,000 to smuggle him into the U.S.

In sum, the Court finds that the length of the respondent's sentence, the repeated nature of the offense, and his continued attempts to misrepresent his motives and to mislead the Court regarding the extent of his involvement in these activities all support the conclusion that he has been convicted of a particularly serious crime. The respondent was clearly an integral part of an ongoing smuggling scheme carried out for profit. The respondent continued his illegal activities in spite of two arrests. He behaved in the manner of an experienced criminal. He used deception, including the obtaining of a Texas driver's license and the purchase of plane tickets under false names, in furtherance of his illegal activities. He has repeatedly lied about his involvement in such activities and refused to accept responsibility for such actions. He has falsely attempted to portray his activities as humanitarian assistance, when they were in fact for profit and involved the illegal smuggling of individuals who had already reached a safe haven.

All of the above convinces this court that (1) the respondent, who has shown no rehabilitation or remorse whatsoever, is at serious risk to resume his illegal activities in the future; (2) that the criminal enterprise in which he has repeatedly engaged, a large scale smuggling network, by its nature poses a risk to the security of the United States; and (3) that the respondent is more of a hardened criminal than he would like the court to believe. All of these factors

support my finding that the respondent has engaged in a particularly serious crime.

The Court also notes that these factors, in the aggregate, cannot but seriously damage the respondent's credibility with regard to other aspects of his testimony, namely his claim that he will be persecuted upon returning to Serbia-Montenegro. Credibility is not an all or nothing proposition, and that one can lie about certain facts while still be credible about others. Yet the manner in which the respondent was willing to repeatedly lie, under oath, for hours about his criminal activities has convinced this court that this respondent is generally unworthy of belief. This conclusion is of course bolstered by his presentation of fraudulent documents to this court and his presentation of inconsistent and implausible testimony regarding his claimed persecution in Montenegro as well.

Based on the Court's adverse credibility findings, as well as its conclusion that the respondent was convicted of a particularly serious crime, all of the respondent's applications for relief must be denied.

V. Analysis of the Co-respondent's Claims

Before addressing the merits of the co-respondent's claims, the Court must make a threshold credibility finding. Having heard her testimony and observed her demeanor, the Court makes the following credibility findings as to her testimony.

Mrs. Radoncic's testimony can generally be divided into three parts. First, she testified about her own experiences in Serbia Montenegro. This testimony consisted of her generalized observations of the escala-

tion of ethnic animosities and specifically the increasing harassment of Muslims by the Serb majority. This testimony included both incidents of discrimination suffered by the respondent personally, and larger scale acts of persecution committed against other Muslims. Based upon the respondent's demeanor during this part of her testimony, the detail and plausibility provided, and the consistency with supporting documents detailing country conditions during this period the Court finds this portion of her testimony to be credible.

The only qualifications which must be added to her overall credibility finding involve a few highly subjective statements about Serbs. These include her statement that the Serbian government would be aware of activities in the United States because "the Serbs know everything"; her blaming of her sister's miscarriage on "Serbs", who she claims "must have done something" to her sister to cause the miscarriage because they did not want Muslims to have children; and her statement that "living among those people is hell", after which she defined "those people" as "Serbian Christians-they're all the same".

Obviously, none of the above statements are credible. However, the Court does not believe that they were knowingly false statements offered by the respondent to intentionally mislead the Court. Rather, they appear to be they genuine belief of this respondent, whose view has been sadly but understandably warped by the horrible tragedies of Bosnia and Kosovo.

However, the Court notes that its favorable credibility finding is limited to Mrs. Radoncic's testimony regarding her *own* experiences in Serbia-Montenegro. The second part of her testimony involved incidents

that purportly happened to her husband. The Court understands that Mrs. Radoncic's testimony regarding her husband's alleged incarceration and conviction was based on information he provided to her. There is no evidence that Mrs. Radoncic had any independent knowledge that the information provided by her husband was false. However, having found the husband's testimony on these facts to be incredible, Mrs. Radoncic's recitation of her husband's false statements must be found incredible as well.

The last part of Mrs. Radoncic's testimony involved her involvement in the purchase of plane tickets in furtherance of her husband's criminal smuggling activities, and as to whether her husband had knowledge that what he was doing was illegal. The Court notes that in response to questions regarding her purchase of tickets from various travel agencies, there was a noticeable change in Mrs. Radoncie's demeanor. She suddenly became evasive, hesitant, and unsure in her answers. This was in marked contrast to her demeanor during other parts of her testimony.

The respondent denied ever purchasing tickets from Louis Overseas Travel, yet was then shown a receipt for the purchase of a ticket from that agency bearing her own name and telephone number. Her attempted explanation for this discrepancy was most unconvincing. The Court did not find this part of her testimony to be credible.

Having determined that the respondent was credible as to her own experiences in Serbia-Montenegro, this Court must decide whether or not actions were, or may be taken against the respondent constituting persecution on account of one of the five grounds enumerated in

INA § 101(a)(42)(A). Mrs. Radoncic's asylum application rests on a claim of past persecution and a well-founded fear of future persecution on account of her religion/ethnicity. Specifically, Mrs. Radoncic contends that as a Muslim, she has been a victim of past persecution, and will be the object of further persecution in the event she is forced to return to Serbia-Montenegro. She also believes that she will be singled out for persecution because of her affiliation with her husband.

The Court will first determine if the co-respondent has been a victim of past persecution due to her religion/ethnicity. Persecution has been defined as a "threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive." *Matter of Sanchez and Escobar*, 19 I&N Dec. 276, 284 (BIA 1985). In addition to physical harm, psychological and verbal abuse of such degree, intensity, duration, and frequency that constitute extreme conduct is also considered persecution. *See Matter of O-Z- & I-Z-*, Int. Dec. 3346 (BIA 1998).

In the instant case, the Court finds that Mrs. Radoncic was not a victim of past persecution. Mrs. Radoncic testified regarding the changes that she observed in Serbia-Montenegro and Kosovo with the rise of Slobodan Milosevic to power and the rise of Serbian nationalism. She testified regarding incidents of discriminatory treatment in school and in the job market. She also told the Court that travel between Kosovo and her hometown of Gusinje became increasingly difficult and cumbersome, as the Serbian police set up more control points and harassed the Muslim passengers. However, Mrs. Radoncic stated that she herself had never been arrested, detained, or interrogated by the

Serbian police or other nationalist groups. Mrs. Radoncic was able to leave the former Yugoslavia prior to the eruption of the wars and the systematic persecution of Muslims, in republics such as Bosnia, at the hands of the Serbian army. The Court does not dispute that with the rising tide of Serbian nationalism, Mrs. Radoncic, a Muslim, felt the effects of discrimination and apprehension about what the future would hold. Furthermore, there is ample evidence in the record establishing that Muslims have been singled out for persecution during the wars in Bosnia and Kosovo. *See e.g.* Exhibits 7 and 8. However, based on her own testimony, the Court finds that Mrs. Radoncic was not persecuted on account of her religion/ethnicity in the past.

Therefore, the Court must address the question of whether the co-respondent faces a well-founded fear of future persecution in her home country. Mrs. Radoncic has asserted that she fears returning to Serbia-Montenegro, where she believes she faces the possibility of persecution, because of her relation to her husband. She also claims that because of a Serbian "pattern and practice" of persecution of Muslims, she faces the risk of persecution, as well. *See* 8 C.F.R. §§ 208.13 (b)(2)(i) and (ii) (stating that an Immigration Judge shall not require the applicant to provide evidence that she would be singled out individually for persecution if the applicant establishes that there is a pattern or practice in her home country of persecution of a group of persons similarly situated to the applicant on account of one of the enumerated grounds, and the applicant establishes her own inclusion in and identification with such group of persons such that her fear of persecution upon return is reasonable).

In the instant case, the Court finds that the record does not support a finding that Mrs. Radoncic faces a likelihood of persecution in the event she returns to Serbia-Montenegro. First, the Court notes that because it has found Mr. Radoncic to be incredible, there is no merit to Mrs. Radoncic's claim that her relationship with her husband will subject her to harm. Second, the Court finds that current country conditions in Serbia-Montenegro do not support Mrs. Radoncic's claim of a pattern or practice of persecution. Mrs. Radoncic's testimony revolved around Serbian aggression in Bosnia and Kosovo. First of all, she never lived in Bosnia, which is now an independent country. The respondent lived briefly in Kosovo as a nursing student in the late 1980s. However, the respondent is not Albanian, would not be returning to Kosovo, has no ties at the present time to Kosovo, and fortunately has not been effected [*sic*] in any way by the recent fighting there.

The respondent's claim of future fear will therefore be examined relating to her return to Montenegro. Firstly, the Court notes the presence of international peacekeepers in the region. The Court also takes note that the Montenegrin government is attempting to democratize, and distance itself from the Milosevic regime. *See* Department of State Country Reports on Human Rights Practices for 1998-Volume II, p. 1475. The Court is in no way finding that persecution along ethnic or religious lines does not exist in Serbia-Montenegro. Instead, the Court is finding that evidence of a pattern or practice of persecution of all Muslims by the Montenegrin government has not been found. An individual may still establish eligibility for asylum from Montenegro based upon his or her Muslim

religion or nationality if the applicant establishes that he or she would be singled out for persecution there on such grounds. However, Mrs. Radoncic has failed to show that she would be singled out for persecution for any reason by the Montenegrin authorities. While she has suffered what amounts to discrimination there in the past on grounds of her religion and nationality, she has failed to establish that she would suffer anything worse in the future solely based upon her religion.

Accordingly, the Court denies Mrs. Radoncic's asylum claim. Because the Court has found that Mrs. Radoncic failed to meet her burden of proof with regard to her asylum claim, it follows that she fails in her withholding of deportation claim, with its higher evidentiary burden.

VI. Voluntary Departure

The respondents have also both requested relief from deportation in the form of voluntary departure. Pursuant to INA § 244(e)(1), the Attorney General may, in her discretion, permit any alien in deportation proceedings to depart voluntarily from the United States at his own expense in lieu of deportation if such alien establishes that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure. However, INA § 244(e)(2) adds that the authority contained in paragraph (1) shall not apply to any alien who is deportable because of a conviction for an aggravated felony. Furthermore, INA § 101(f)(8) states that no person who at any time has been convicted of an aggravated felony shall be regarded as a person of good moral character.

Accordingly, based on the aforementioned provisions, the Court finds that the lead respondent, Mr. Radoncic, is statutorily ineligible for voluntary departure. However, there being no adverse factors against Mrs. Radoncic, the Court finds that she is eligible for voluntary departure.

VII. Orders

Accordingly, after a careful review of the record, the following orders shall be entered:

IT IS HEREBY ORDERED that the lead respondent's application for withholding deportation, pursuant to INA § 243(h), be DENIED.

IT IS ORDERED that the lead respondent's application for relief pursuant to Article 3 of the Convention Against Torture be DENIED.

IT IS ORDERED that the lead respondent's application for voluntary departure, pursuant to INA § 244(e) be DENIED.

IT IS ORDERED that the lead respondent be removed to Serbia-Montenegro.

IT IS ORDERED that the co-respondent's application for asylum, pursuant to INA § 208(a), be DENIED.

IT IS ORDERED that the co-respondent's application for withholding of deportation, pursuant to INA § 243(h) be DENIED.

IT IS ORDERED that the co-respondent's application for voluntary departure, pursuant to INA § 244(e), be GRANTED. The co-respondent must leave the United

States, without expense to the government, on or before May 11, 2000, or any extensions as may be granted by the District Director, and under whatever conditions the District Director may direct.

IT IS FURTHER ORDERED that if the co-respondent fails to depart as required, the above order shall be withdrawn without further notice or proceedings and the co-respondent shall be ordered removed to Serbia Montenegro.

Date: April 11, 2000

/s/ JEFFREY S. CHASE
JEFFREY S. CHASE
Immigration Judge

Supreme Court U.S.
FILED
MAY 30 2002
OFFICE OF THE CLERK

No. 01-1459

IN THE

Supreme Court of the United States

KENNETH J. ELWOOD, DISTRICT DIRECTOR,
IMMIGRATION COURT OF THE UNITED STATES,

Petitioner,

v.

SABRIJA RADONCIC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

JAMES J. ORLOW
ORLOW AND ORLOW, P.C.
Attorneys for Respondent
600 Chestnut Street
Philadelphia, PA 19106
(215) 922-1183

174244

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

17pgs

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Counter Statement	1
Reason for Denying the Writ	6
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Bugavenitz v. Adams, 228 INS 585 (1913) 10

Chi Thong Ngo v. I&NS, 192 F.3d 390 (3d Cir 1999) 10

Galvan v. Press, 347 U.S. 522 (1954) 9

Hoang v. Confort, 282 F.3d 1247 (10th Cir 2002) ... 7

In Re: Adeniji, Int. Dec. 3417 (BIA 1999) 3

Jordan v. DeGeorge, 341 U.S. 228 (1951) 9

Kim v. Ziglar, 276 F.3d 323 (9th Cir 2002) 5, 7

Matter of Ching, 12 I&N Dec 710 (BIA 1968) 4, 12

Matter of Patel, 15 I&N Dec 666 (BIA 1976) 2

Parra v. Prettyman, 172 F.3d 954 (7th Cir 1999) .. 6

Patel v. Zemski, 275 F.3d 299 (3d Cir 2001) ..... *passim*

Sale v. Haitian Centers Council, 509 U.S. 155 (1993) 1

United States v. Salerno, 481 U.S. 739 (1987) 2

U.S. ex rel. Mezei v. Shaughnessey, 345 U.S. 306 (1984) 1

Cited Authorities

	Page
Wong Wing v. United States, 163 U.S. 228 (1896)	1-2
Zadvydas v. Davis, 533 U.S. 678 (2001)	*passim*
United States Constitution:	
Fifth Amendment	1, 9, 10
Statutes:	
8 U.S.C. § 1125(c)	3
8 U.S.C. § 1131(a)	6
8 U.S.C. § 1226	1
8 U.S.C. § 1226(c)	*passim*
8 U.S.C. § 1231	1
8 U.S.C. § 1231(a)(2)	4
8 U.S.C. § 1231(a)(1)(B)(iii)	4
Rule:	
United States Supreme Court Rule 15.2	1

Cited Authorities

Page

Other Authorities:

8 C.F.R. § 3.19 ..... 2, 10

8 C.F.R. § 3.19(i)(1) 2, 9

8 C.F.R. § 3.19(i)(2) 2, 9

8 C.F.R. § 3.38 2

8 C.F.R. § 236.1(c) 10

8 C.F.R. § 236.1(d) 2, 10

8 C.F.R. § 241.3 10

8 C.F.R. § 241.4 10

8 C.F.R. § 1226(c) 2

Transitional Period Custody Rules of § 303(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 PL 104-208 (IIRAIRA) 3

COUNTER STATEMENT

In accordance with Rule 15.2 of this Court's Rules, Respondent makes the following response to Petitioner's Statement.

1. Aliens in the United States who are subject to removal (formerly exclusion or deportation) are subject to two separate types of detention in physical custody, prior to a final order and after a final order. Pre-order custody is provided in 8 U.S.C. § 1226 and post-order custody is provided in 8 U.S.C. § 1231. The Court recently addressed post-final order custody in *Zadvydas v. Davis*, 533 U.S. 678 (2001). This case involves pre-final order custody under 8 U.S.C. § 1226(c).

Aliens subject to removal proceedings include those stopped at the border and those who have already gained access to the United States. *U.S. ex rel. Mezei v. Shaughnessey*, 345 U.S. 306 (1984) and *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) address the custody of aliens no yet "in" the United States. This case involves an alien already here.

Aliens who are in the United States but subject to removal (deportation) proceedings include lawful permanent residents, illegal border crossers and non-resident aliens who were legally admitted but who are said to have violated their status by a specified act or admission. This case involves an alien who entered the United States illegally. Should Certiorari be granted, a threshold question is whether aliens within the United States are "persons" within the meaning of the Fifth Amendment or whether that provision's protection is to be conditioned on legality of initial entry or maintenance of legal status. *Wong Wing v. United States*, 163

U.S. 228 (1896) and similar cases hold that illegal aliens in the United States are entitled to due process. The issue would seek reconsideration of substantial precedent, contrary to *Zadvydas*.

The specific issue in this case arises because custody of all aliens subject to removal on a variety of criminal convictions are subjected to mandatory detention by the terms of 8 U.S.C. § 1226(c). The detention is without any consideration of offense behavior, family equity, likelihood or relief, contest of removability, danger to the public or likelihood of flight. The only bail hearing such an accused gets is to determine his or her identify, alienage and that the illegal conviction relates to him or her and is as proscribed by 8 C.F.R. § 1226(c).

In cases of removal not subject to 8 U.S.C. § 1226(c), there is a long-standing procedure for release on bail. 8 C.F.R. §§ 3.19 and 236.1(d). The issues on bail are "danger to the public" and "likelihood of flight." In *Matter of Patel*, 15 I&N Dec 666 (BIA 1976), the burden of proof for bail is on the alien, not the I&NS. Compare *United States v. Salerno*, 481 U.S. 739 (1987). Bail proceedings are separate and apart from consideration of the removal proceedings. The I&NS has not only a right of appeal of bail under stay or *supercedeas* 8 C.F.R. §§ 3.38 and 3.19(i)(1), the I&NS also has the right to stay release, of its own act, without permission or supervision of any Court or Board. 8 C.F.R. § 3.19(i)(2).

In these cases the aliens are in custody in county jails used by state authorities for both pre-trial criminals and shorter sentenced criminals. The "beds" are "rented" by the I&NS for custody since the I&NS does not have its own facilities. Thus while removal is "civil" custody is "criminal".

The Immigration Judge held that in its terms 8 U.S.C. § 1125(c) applied to him. Radoncic challenged that statute to seek access to the system of bail described. In light of the flat statutory bar to such proceedings, access to a hearing was possible only if § 1226(c) was unconstitutional. The Immigration Judge held himself bound by the statute. The District Court was affirmed by the Court of Appeals, holding that 8 U.S.C. § 1226(c) denied Respondent due process of law. Should certiorari be granted, the same facts also implicate constitutional issues of Separation of Powers and Bill of Attainder. In § 1226(c) the Congressional act holds that no alien with one of the proscribed convictions could be permitted to qualify for bai[1] under any standard. This adds imprisonment during proceedings to a class of persons who have served their sentences without further hearing. Moreover, it is legislation which makes an adjudicatory decision without any consideration of the facts and circumstances of a particular case, substituting legislation for an established adjudicatory process.

2. Petitioner's second point is wholly related to Respondent's deportation proceedings. Indeed this case is so old it predates the 1996 amendments. Under the Transitional Period Custody Rules of § 303(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 PL 104-208 (IIRAIRA), Respondent would have qualified for bail, not withstanding 8 U.S.C. § 1226(c). *In Re: Adeniji*, Int. Dec. 3417 (BIA 1999). However, he was released from penal custody in May 2000 after the transitional period was ended (April 9, 1998). The merits of Petitioner's (and his wife's) deportation proceeding as subject to a Petition for Review pending in the Court of Appeals for the Second Circuit (#01-4201). Since the Circuit Court has stayed deportation, he is not subject to post-order custody under

the terms of 8 U.S.C. § 1231(a)(2) and, if 8 U.S.C. § 1226(c) is lawful, is still subject to it. The stay precludes beginning the post-order period of removal. 8 U.S.C. § 1231(a)(1)(B)(iii). The merits of Respondent's deportation case would not be before the Court of certiorari were granted.

Of signal significance is the actual charge of deportation made against Radoncic. He was said to be mandatorily held in custody because of conviction for smuggling aliens. He was so convicted in January 1999 based on an August 1996 arrest in Vermont. However, contrary to Petitioner's argument, he was never charged in deportation proceedings for this conviction. Indeed, as stated, he could hardly have been charged in August 1996 for a January 1999 conviction. The Immigration Judge's decision in deportation proceedings, Petition p. 22a, documents the sole charge was "entry without inspection". The Board of Immigration Appeals decision, Petition, p 188, footnote 1, documents the failure to sustain a charge in deportation of "alien smuggling". Never having been charged with that conviction, Radoncic should never have been held subject to § 1226(c) in its terms since "is deportable" in deportation use means actually charged as deportable. *Matter of Ching*, 12 I&N Dec 710 (BIA 1968).

3. Statement is correct.

4. In affirming the District Court, the Court of Appeals relied on it holding in *Patel v. Zemski*, 275 F.3d 299 (3d Cir 2001). However, the Court of Appeals designated their holding in this case as non-precedential, in accordance with Third Circuit Internal Operating Procedure 5.3, which then provided:

> Opinions which appear to have value only to the trial court or the parties are designated by the

> court as unreported and are not sent by the court for publication. These may include, at the option of the majority of the panel, divided panel opinions affirming the judgment of the trial court, granting or denying a petition for review or enforcement of the order of an administrative agency, divided or unanimous opinions reversing or vacating the judgment of the trial court or remanding to the trial court, and per curiam opinions. Per curiam opinions may be utilized for affirming, reversing, vacating, modifying, setting aside, or remanding the judgment, decree, or order appealed from; for dismissing an appeal; for granting or denying a petition for review; and for granting or refusing enforcement of the order of an administrative agency. An opinion that is designated by the court as unreported shall state "unreported, no precedential" on the face of the opinion. [This rule was amended Mar. 1, 2002]

Patel was decided on December 19, 2001. This case was decided on January 4, 2002, by the same panel. Petitioner is seeking certiorari in *Kim v. Ziglar*, 276 F.3d 323 (9th Cir 2002) (S. Ct. #01-1491), a case similar to *Patel v. Zemski*; they did not seek certiorari in *Patel v. Zemski*. Should certiorari be granted in this case, there are additional issues raised by this configuration of holdings, vis

a. The effect of *Patel v. Zemski* under the doctrine of *stare decisis*, inasmuch as certiorari was not sought in that case.

b. The legal and constitutional significance of the instant case as a "non-precedential" decision.

These aspects are potentially significant both as a question of "due process" and as a matter within this Court's role as supervisory of the Courts of Appeals.

REASON FOR DENYING THE WRIT

1. A principal reason for granting certiorari is the division of Circuits. Petitioner argues that there is such conflict between *Patel v. Zemski*, 275 F.3d 299 (3d Cir 2001) and *Parra v. Prettyman*, 172 F.3d 954 (7th Cir 1999) insofar as the Third Circuit granted relief while the Seventh Circuit rejected a due process challenge to the same statute, 8 U.S.C. § 1226(c).

The asserted conflict is less than direct or significant. In *Parra*, the rejection was, in fact, not a holding but a *dictum*. The alien in *Parra* had conceded removability at the hearing level. He did not appeal the Immigration Judge's Order. The Order of the Immigration Judge became final thirty days later. It was never subject to any post-order appeal or motion to reopen or reconsider. Indeed, the Seventh Circuit's opinion notes the absence of even a claim of error in the base order. As such, Parra's custody was not under 8 U.S.C. § 1226(c) when the Court of Appeals decided that case; the custody was under 8 U.S.C. § 1131(a). The language in *Parra* appears to be the result of misinformation or incomplete analysis by the Seventh Circuit. Correction of that dictum in *Parra* is best managed by the Seventh Circuit itself.

What is presented as conflicting is not *Radoncic* but *Patel v. Zemski*. But *Patel* is not before this Court. *Radoncic* followed *Patel* by *stare decisis*. *Patel* was not sought to be reviewed. Assertedly, *Patel* was said to be moot; it was no more nor less moot than *Radoncic* (discussed at point 5 below).

Moreover, *Radoncic* is non-precedential. Under Third Circuit rules it cannot be cited as authority. As such neither circuit's disposition is in conflict with the other. Certiorari is not merited on the claimed ground of conflict.

2. Petitioner appear to argue that although *Kim v. Ziglar*, 276 F.3d 323 (9th Cir 2002); *Hoang v. Confort*, 282 F.3d 1247 (10th Cir 2002); and *Patel v. Zemski*, 275 F.3d 299 (3d Cir 2001) applied constitutional protection to aliens who were lawful permanent residents, certiorari is appropriate because Radoncic, like Parra, entered illegally. Petitioner argues that Radoncic had "little hope" of remaining. However, in his criminal proceedings sentencing, the U.S. District Judge, at sentencing stated:

> In addition, the Court has the following recommendation. This Court has sat through a two-week long trial. The court has reviewed in detail Mr. Radoncic's participation in the offense. The Court finds this to be an extraordinary situation. Whether profit was or was not gained, this defendant did not become wealthy, and this Court finds that a major purpose was in service of his community in Yugoslavia, and in service of his local community in Astoria, New York. And although this Court has no power over the issue, the Court recommends strenuously that this defendant not be deported upon completion of his sentence. And also that this statement from the Court be sent to the court, immigration court, if that's — if the court is to address his deportation.

Radoncic has challenged and continued to challenge the order of deportation. A petition for review on substantive

grounds is pending in the Second Circuit. Parra did not even question his final Order of Removal. The meaningful distinction for pre-trial custody purpose is whether deportation or removability is conceded or challenged. The success or failure of the challenge is reserved to the merits of the case, which is not presented here. Radoncic took hope from the sentence of the District Court at his criminal conviction. The contest continued well past his November 30, 2000, release on I&NS bail. He has been on bail for one and one half years during his contest. Parra went from pre-order to post-order in thirty days. Petitioner's point is inconsistent with the facts of these two cases. Moreover this Court's recent decision in *Zadvydas v. Davis*, *supra*, resolved the issue as to post-order custody.

3. Petitioner asserts that the Court of Appeals is wrong. If by that they mean *Patel v. Zemski* to be distinguished from *Radoncic*, the only distinction is that Mr. Patel was a lawful permanent resident and Radoncic entered without inspection. Both were convicted of aggravated felonies. In both cases, the criminal justice system had no difficulty in granting a bail hearing. Both were admitted to criminal bail. Neither violated bail. Both have been admitted to I&NS bail.

In simplest terms, Petitioner appears to contend that Radoncic is a "person" for criminal justice purposes but is not a "person" for deportation purposes, because of the same crime and conviction solely because of a prior illegal entry. However, if the ground of deportation or removal were the illegal entry itself and not an aggravated felony 8 U.S.C. § 1226(c) would not apply and Radoncic would have been eligible for a hearing without limitation. The alien's objective in this case was access to a hearing for bail which the Immigration Judge denied because of the mandate of 8 U.S.C. § 1226(c) Bail itself is not an issue on this record.

There is no issue of risk to the public. Were there a risk, bail would be denied at the bail hearing by the Immigration Judge. Moreover, unlike criminal bail where the burden is on the prosecutor, in deportation cases the burden of proof is on the alien. Additionally, bail is appealable and release is stayed by I&NS unilateral action. 8 C.F.R. §§ 3.19(i)(1) and (2).

Illegality of entry as a basis to deny due process of law is inconsistent with Congressional grants of amnesty and other relief from illegal entry. In *Zadvydas v. Davis*, *supra*, this Court started its analysis that deportation is a civil rather than a criminal process. Yet criminal process provides for a bail hearing. *Zadvydas* held that deportation is not intended as a punishment. Without bail Respondent would have served an additional 19 months in county jail over and above his penal sentence of 18 months and interim I&NS custody of 10 months.

What Petitioner sought and what he got was a hearing on an application for bail. The actual hearing, as in most Immigration bail proceedings, took only a few minutes. Mostly, the hearings are based on offers of proof by opposing counsel and a brief *voire dire* of the alien by the Immigration Judge. No verbatim record is required or provided. The process required is little enough yet it meets the standard.

If, alternatively, Petitioner wants a broader defense of § 1226(c) based on the nature of the crime rather than mode of entry into the United States, a more serious attack on the Fifth Amendment is underway. Deportation is so serious that it merits quasi-criminal analysis. *Jordan v. DeGeorge*, 341 U.S. 228 (1951) and *see Galvan v. Press*, 347 U.S. 522, 531 (1954).

Periodically this Republic is swept with general and special xenophobia. Post September 11, 2001, the Congress felt it necessary to provide special concern for American Sikhs, many of whom wear beards and turbans as a religious observance. Were the plebeian passions to run the other way the Bill of Rights stands to protect individuals from passions of the moment. While it may be argued that aliens who are not here cannot achieve constitutional protection, present persons must be considered as Fifth Amendment "persons". A contrary holding does violence to the words themselves.

Petitioner argues that the Court of Appeals in *Patel* misinterpreted this Court's acknowledgment in *Zadvydas* that due process "may vary depending on status and circumstances". This comment may well relate to aliens initially stopped at the border as apprehended on the high seas. But the Third Circuit in *Patel* followed its earlier sense of dueness of process in *Chi Thong Ngo v. I&NS*, 192 F.3d 390 (3d Cir 1999), incarceration requires some kind of individualized consideration. In pre-order cases this is provided by 8 C.F.R. §§ 3.19 and 236.1(c) and (d) and in post-order cases by 8 C.F.R. §§ 241.3 and 241.4.

In the extent that Petitioner argues for mandatory pre-order custody for aliens, it argues for that result because of illegal entry, criminal conviction and recency of presence. The argument neglects the fact that custody is in county prisons under the same terms as pre-trial felons and post sentence lesser terms of penal incarceration. This argument is not only unworthy of an American system of justice, it also gives lie to the holding in *Zadvydas* that there is no punishment intended. It seriously undercuts the holding in such cases as *Bugavenitz v. Adams*, 228 INS 585 (1913) that deportation is civil not criminal.

In the instant case the 1996 amendments made custody mandatory, irrespective of the date of the crime or the date of conviction, if the alien committed an aggravated felony or crime of "moral turpitude". It enacts a sanction enforced in a county jail, by legislation rather than adjudication. The sanction is imprisonment which can be avoided only by abandoning all defenses and remedies. Parra chose to do that; Radoncic did not.

5. The Record in this case renders certiorari inappropriate. Radoncic's deportation is stayed pending disposition in the Second Circuit. Under terms of 8 U.S.C. the post-order custody statute does not apply. The present custody issue is not moot.

However, there is no assurance that the issue will remain alive. Were the Court of Appeals to vacate the stay as to rule against Radoncic, the issue ceases to exist. There is also a question as to whether the issue survived the bail hearing of November 29, 2000. The Petitioner had not sought a stay or supercedeas from the from the District Court or the Court of Appeals. It did not appeal the bail order which the Immigration Judge granted. In sum, the record of this case is inappropriate as a vehicle to address the constitutionality of § 1226(c).

This record is further confounded by the non-precedential designation of the decision and the stare-decisis effect of *Patel v. Zemski* in the absence of a petition for certiorari in *Patel*. This record is also inappropriate for certiorari since Radoncic was not subject to mandatory custody even though he was subjected to it by the Immigration Judge. 8 U.S.C. § 1226(c) relates to specific deportation charges. Although Radoncic was convicted of alien smuggling, and alien

smuggling is an aggravated felony which is a basis for mandatory custody, Radoncic was not charged with this conviction as a basis for deportation. *See Matter of Ching*, 121 I&N Dec 710 (BIA 1968) holding that "is deportable" requires a charge of deportability for the imposition of a sanction. Since the only charge against him was "entry without inspection" and that is not a basis for mandatory custody, this record is not appropriate as a case worth of certiorari.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

JAMES J. ORLOW
ORLOW AND ORLOW, P.C.
Attorneys for Respondent
600 Chestnut Street
Philadelphia, PA 19106
(215) 922-1183

Supreme Court, U.S.
FILED

JUN 11 2002

(3)

No. 01-1459

In the Supreme Court of the United States

KENNETH J. ELWOOD, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

SABRIJA RADONCIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13 pp

TABLE OF AUTHORITIES

Cases:	Page
Bejjani v. *INS*, 271 F.3d 670 (6th Cir. 2001)	4
Buckhannon Bd. & Care Home, Inc. v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2002)	7
Ching, In re, 12 I. & N. Dec. 710 (1968)	6
Clark County Sch. Dist. v. *Breeden*, 532 U.S. 268 (2001)	7
Cooper Indus., Inc. v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)	7
Dakota County v. *Glidden*, 113 U.S. 222 (1885)	5
Eastern Assoc. Coal Corp. v. *United Mine Workers of Am., Dist. 17*, 531 U.S. 57 (2000)	7
El Paso Natural Gas Co. v. *Neztsosie*, 526 U.S. 473 (1999)	6
INS v. *St. Cyr*, 533 U.S. 289 (2001)	3
Johnson v. *Eisentrager*, 339 U.S. 763 (1950)	9
Kim v. *Ziglar*, 276 F.3d 523 (9th Cir. 2002)	5
Landon v. *Plasencia*, 459 U.S. 21 (1982)	9
Lewis v. *Continental Bank Corp.*, 494 U.S. 472 (1990)	5
Mancusi v. *Stubbs*, 408 U.S. 204 (1972)	5
Modesto Adalberto MELO-Pena, In re, 21 I. & N. Dec. 883 (BIA 1997)	6
Northwest Airlines, Inc. v. *County of Kent*, 510 U.S. U.S. 355 (1994)	6
Parra v. *Perryman*, 172 F.3d 954 (7th Cir. 1999)	3, 4
Patel v. *Zemski*, 275 F.3d 299 (3d Cir. 2001)	2, 8
Plyler v. *Doe*, 457 U.S. 202 (1982)	9, 10
Shaughnessy v. *Mezei*, 345 U.S. 206 (1953)	10
United States v. *Salerno*, 481 U.S. 739 (1987)	8
Zadvydas v. *Davis*, 533 U.S. 678 (2001)	8

Statutes: Page

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1182(c) 3
8 U.S.C. 1226(c) 1, 2, 3, 4, 5, 6, 7, 8, 9
8 U.S.C. 1231(a) 4
8 U.S.C. 1231(a)(1)(B)(ii) 4
8 U.S.C. 1251(a)(1)(E)(i) (1994) 6

In the Supreme Court of the United States

No. 01-1459

KENNETH J. ELWOOD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

SABRIJA RADONCIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The certiorari petition demonstrates, and respondent does not dispute, the importance of the question presented in this case. The Third Circuit has held an Act of Congress unconstitutional. Each week, moreover, hundreds of additional criminal aliens come within the category of persons whom Congress required to be detained under 8 U.S.C. 1226(c) to ensure their removal from the United States and to protect the community against further crimes. See Pet. 16-17. Many of those mandatory detainees are aliens who, like respondent, entered the United States unlawfully and without inspection. The Third Circuit's decision in this case therefore bears upon the detention of thousands of aliens in removal proceedings, and it has immediate

importance for the status of all illegal aliens detained pursuant to Section 1226(c) at Immigration and Naturalization Service (INS) facilities within the Third Circuit.

The Third Circuit's decision in this case is all the more deserving of review because the court of appeals has extended the reasoning of *Patel* v. *Zemski*, 275 F.3d 299 (3d Cir. 2001), to aliens who have never been present legally in the United States. *Patel* involved the constitutionality of Section 1226(c) as applied to a lawful permanent resident alien—which is the subject of the pending petition in *DeMore* v. *Kim*, No. 01-1491 (filed Apr. 9, 2002). Granting the petition in this case, as well as in *Kim*, will enable the Court to address the constitutionality of Section 1226(c) in an important additional context and therefore will reduce the likelihood of future disagreements in the lower courts about the constitutionality of Section 1226(c). See Pet. 19-20. If the Court were to grant the petition in *Kim* without also granting review in a case involving an alien who is present in the United States unlawfully, future consideration by this Court of the constitutionality of Section 1226(c) as applied to illegal aliens might well prove necessary.

1. Respondent argues that certiorari should not be granted because the circuits are not in express disagreement about the constitutionality of Section 1226(c) as applied to aliens who entered the United States unlawfully, without inspection. See Br. in Opp. 6-8. That argument ignores the strong practical reason, discussed above, to grant review in this case as well as on the question presented in *Kim* (as to which the Circuits do expressly disagree, see Pet. 13-15).

The Seventh Circuit, moreover, has held that Section 1226(c) comports with due process as applied to a lawful

permanent resident whose "legal right to remain in the United States has come to an end" and who has "little hope" of avoiding removal to another nation. See *Parra* v. *Perryman*, 172 F.3d 954, 958 (1999). The protected due process rights of illegal aliens clearly are no greater than those of the lawful permanent resident in *Parra*. See Pet. 17; see also pp. 8-9, *infra*. Criminal aliens who entered the United States illegally also are less likely than criminal resident aliens to have a claim to relief from removal under the immigration laws. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 326 (2001) (holding that discretionary relief from removal is available to lawful permanent residents who would have been eligible for relief from deportation under 8 U.S.C. 1182(c) (1994) when they pleaded guilty to criminal offense). It therefore follows *a fortiori* that detention of an illegal entrant during the pendency of removal proceedings is lawful in the Seventh Circuit, at least if the alien has no viable claim to relief from removal. The holding of the Third Circuit in this case—that respondent was entitled to an individualized bond hearing without regard to his illegal entry or likelihood of obtaining relief from removal—thus puts the Third Circuit at odds with the Seventh Circuit. See Pet. 15-16.[1]

Respondent also argues that the question of the constitutionality of Section 1226(c) was moot in *Parra* because Parra was subject to a final order of removal and, therefore, the Seventh Circuit's holding should be

---

[1] Consistent with *Parra*, respondent appears to acknowledge that mandatory detention of an alien who entered the United States illegally is permissible when removability is not contested. See Br. in Opp. 8. The court of appeals, however, did not condition its extension of *Patel* to illegal entrants upon respondent's attempts to avoid removal.

treated as dictum. Br. in Opp. 6. The Seventh Circuit, however, decided the case on the basis that Parra was *not* subject to a final order of removal (172 F.3d at 956) and was being detained under Section 1226(c) "pending the conclusion of removal proceedings" (*id.* at 955). Thus, the Seventh Circuit squarely held that Section 1226(c) "plainly is within the power of Congress." *Id.* at 958.

2. Respondent agrees with the government that this case "is not moot."[2] Br. in Opp. 11; see Pet. 21. He notes, however, that the case might become moot if his efforts to obtain judicial or administrative relief from removal are unsuccessful. *Ibid.* The petition notes that possibility (Pet. 20-21), but also explains (Pet. 20) that a possibility of mootness is inherent in all challenges to detention under Section 1226(c), and that this possibility counsels in favor of granting certiorari and hearing oral argument in *both* this case and *Kim*.

Respondent further suggests that there is a "question" whether the detention controversy in this case terminated when an IJ released respondent on bond in

---

[2] Respondent is incorrect when he claims (Br. in Opp. 3-4) that, but for the district court's habeas corpus order and the court of appeals' affirmance of it, he *currently* would be detained under Section 1226(c). The INS has interpreted 8 U.S.C. 1231(a) (governing detention after a final order of removal) as applying to an alien whose final administrative removal order has been stayed by the court of appeals, although in the event of such a stay the 90-day removal period does not begin to run until the court enters its final order, see 8 U.S.C. 1231(a)(1)(B)(ii). But see *Bejjani* v. *INS*, 271 F.3d 670, 689 (6th Cir. 2001). That issue has no relevance for respondent's case, however. The parties agree that respondent is or was subject to detention under Section 1226(c) and that this case did not become moot when, in November 2001, the Board affirmed the removal order issued by the immigration judge (IJ). See Pet. App. 18a-21a (Board order).

compliance with the district court's habeas corpus order. Br. in Opp. 11. When a "defendant has merely submitted to perform the judgment of the court," he generally "[does] not thereby los[e] his right to seek a reversal of that judgment by writ of error or appeal." *Mancusi* v. *Stubbs*, 408 U.S. 204, 207 (1972) (quoting *Dakota County* v. *Glidden*, 113 U.S. 222, 224 (1885)). Moreover, if this Court grants the petition and reverses the judgment of the court of appeals, then the INS will be able to move to vacate the IJ's bond order and take respondent back into custody under Section 1226(c) if respondent is again put in removal proceedings. See Pet. 21 (discussing possible reopening of administrative proceedings). The government's injury from the district court's habeas corpus order therefore would be redressed by a favorable judicial decision, notwithstanding that respondent was released on bond under the terms of the district court's order. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990); see also *Kim* v. *Ziglar*, 276 F.3d 523, 526 (9th Cir. 2002) ("Although Kim is no longer in custody, the case continues to present a live controversy because the INS states that it will take Kim into custody and hold him without bail if we reverse."), petition for cert. pending, No. 01-1491 (filed Apr. 9, 2002).

3. Respondent makes three additional, case-specific arguments against review of the Third Circuit's decision.

a. Respondent suggests (Br. in Opp. 4, 11-12) that—although he was convicted in 1999 of alien smuggling, which he concedes (*id.* at 11-12) is an aggravated felony that triggers Section 1226(c), see Pet. 11—he should not have been detained under Section 1226(c) because the INS did not list the federal conviction as specific grounds for his deportation, see Pet. 5, 6-7. That

argument was not presented to or passed upon by the court of appeals, and it therefore is not a proper ground on which to defend the court of appeals' judgment. See *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994) (respondent may "defend a judgment on any ground *properly raised below*") (emphasis added); see also *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999). Respondent also fails to note that, in August 1996, the INS charged respondent with being deportable under 8 U.S.C. 1251(a)(1)(E)(i) (1994), based upon the alien-smuggling prosecution.[3] See Pet. 6-7; see also Br. in Opp. 4 (agreeing with facts stated in petition).

Moreover, the applicability of Section 1226(c) does not depend upon the INS's charges against the alien. Section 1226(c) requires detention of an alien who "is deportable" for having committed an aggravated felony. The Board has held (contrary to respondent's assertion, see Br. in Opp. 4) that the class of aliens covered by this language is *not* limited to aliens whom the INS has charged with being deportable on that ground. See *In re Modesto Adalberto MELO-Pena*, 21 I. & N. Dec. 883, 884-885 & n.2 (BIA 1997) (interpreting "is deportable" in context of custody during removal proceedings and distinguishing *In re Ching*, 12 I. & N. Dec. 710 (BIA 1968), upon which respondent relies).

b. Respondent asserts (Br. in Opp. 5) that the Third Circuit's *Patel* decision is "*stare decisis*" for purposes of this case. In *Kim*, the government has sought certio-

---

[3] The Board did not base respondent's final order of removal upon the alien-smuggling charge. See Pet. App. 18a n.1. That charge nevertheless was before the Board during the administrative removal proceedings, and the Board relied upon respondent's alien-smuggling conviction in its decision. See Pet. App. 19a.

rari on the same issue presented in *Patel*: Whether the mandatory detention provisions of 8 U.S.C. 1226(c) satisfy the requirements of due process as applied to a criminal alien who is a lawful permanent resident of the United States. The petition in this case explains (Pet. 20 n.10, 22 n.11) that *Patel* presented serious mootness concerns that made it an unsuitable vehicle for this Court's consideration of that question. If this Court reverses the Ninth Circuit's judgment in *Kim*, however, *Patel* will be superseded. Furthermore, the vitality of *Patel* as Third Circuit precedent says nothing about whether the Third Circuit correctly extended *Patel* to invalidate the mandatory detention of respondent (who, unlike Patel, entered the country illegally and was never granted permanent resident status).

c. Respondent suggests that the Third Circuit's failure to publish its decision in the Federal Reporter is an obstacle to review by this Court. Br. in Opp. 4-5, 7. If the Third Circuit's decision not to publish turned on its view that "the legal issue [in this case] is the same" as in *Patel* (Pet. App. 5a), then the court of appeals' reasoning was incorrect. See Pet. 17. But regardless of the court of appeals' rationale for not publishing, the unpublished nature of the court of appeals' decision does not affect the decision's finality or moot the controversy between the parties. This Court commonly grants certiorari to review an unpublished decision of a federal court of appeals. See, *e.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001); *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 430 (2001); *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 269 (2001) (per curiam); *Eastern Assoc. Coal Corp.* v. *United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 61 (2000).

4. On the merits of the due process issue, respondent argues that his detention under Section 1226(c) should be deemed an impermissible criminal penalty, rather than analyzed as civil detention. See Br. in Opp. 2, 3, 9-11. Respondent appears to recognize (*id.* at 9, 10) that his argument is inconsistent with the reasoning of *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001), in which this Court treated detention after a final order of removal as civil, not criminal, in nature. So too, the Third Circuit held in *Patel* that Section 1226(c) is civil in nature, 275 F.3d at 311, and its holding was incorporated into the Third Circuit's decision in this case, see Pet. App. 5a-6a. As the court of appeals correctly held in *Patel*:

> The power to deport necessarily encompasses the power to detain. Thus, the detention mandated in [Section 1226(c)] is regulatory and not punitive. *See Carlson*[v. *Landon*, 342 U.S. 524, 537-538 (1952)] ("Deportation is not a criminal proceeding and has never been held to be punishment. . . . Detention is necessarily a part of this deportation procedure.").

275 F.3d at 310-311; see *United States* v. *Salerno*, 481 U.S. 739, 747 (1987) ("Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.") (internal quotation marks and brackets omitted).

Respondent also appears to dispute that aliens who entered the United States unlawfully are entitled to lesser due process protection in connection with their removal proceedings than lawful permanent resident

aliens. Br. in Opp. 8, 10. Indeed, respondent seems to contend that all aliens who enter the United States (whether legally or illegally, temporarily or permanently) must be treated alike when weighing the relevant factors in the due process analysis. *Id.* at 10. Those arguments are contrary to both common sense and this Court's decisions. See *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien *gains admission* to our country and *begins to develop the ties that go with permanent residence*, his constitutional status changes accordingly.") (emphasis added); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").[4]

Finally, respondent suggests that the governmental interest in detaining a particular alien must always be determined in an individualized bond hearing. See Br. in Opp. 2, 10. Respondent here ignores Congress's legislative powers to classify aliens and to regulate their admission and removal, see *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982), as well as the record of failed efforts to deport non-detained criminal aliens that Congress confronted when it drafted Section 1226(c). See Pet. 1-4, 17-19; see also *Kim* Pet. 14-19. Under respondent's proposed due process rule, the judgment of an individual IJ or a court about matters such as the importance

---

[4] Nor does this case turn upon whether respondent is deemed a "person" for due process purposes. See Br. in Opp. 1-2, 8; cf. *Plyler* v. *Doe*, 457 U.S. 202, 210-212 (1982). The question, rather, is what "process" is "due" in connection with removal proceedings involving an alien who entered the United States illegally and committed an aggravated felony while illegally present in the country.

of ensuring an aggravated felon's availability for removal would trump the legislative judgment of Congress. That would be a radical departure from this Court's historical approach to statutes bearing upon the removal of aliens. See, *e.g.*, *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Plyler*, 457 U.S. at 225 ("Congress has developed a complex scheme governing admission to our Nation and status within our borders. The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.") (citations omitted).

* * * * *

The petition for a writ of certiorari should be granted and the case should be set for oral argument in tandem with, or be consolidated for oral argument with, *DeMore* v. *Kim*, petition for cert. pending, No. 01-1491 (filed Apr. 9, 2002).

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JUNE 2002

Nos. 01-1459

IN THE
Supreme Court of the United States

KENNETH J. ELWOOD, District Director,
Immigration and Naturalization Service,
Petitioner,

v.

SABRIJA RADONCIC,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPS. BOB BARR, JOE BARTON, GEORGE GEKAS, WALTER JONES, LAMAR SMITH, JOHN SWEENEY, AND DAVE WELDON; U.S. SENATOR JESSE HELMS; AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: May 31, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE
SUPREME COURT OF THE UNITED STATES

No. 01-1459

KENNETH J. ELWOOD, District Director,
Immigration and Naturalization Service,
Petitioner,

v.

SABRIJA RADONCIC,
Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPS. BOB BARR, JOE BARTON, GEORGE GEKAS, WALTER JONES, LAMAR SMITH, JOHN SWEENEY, AND DAVE WELDON; U.S. SENATOR JESSE HELMS; AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF); U.S. Representatives Bob Barr, Joe Barton, George Gekas, Walter Jones, Lamar Smith, John Sweeney, and Dave Weldon; U.S. Senator Jesse Helms; and the Allied Educational Foundation respectfully

move for leave to file the attached brief as *amici curiae* in support of Petitioner. Petitioner has consented to the filing of this brief. Counsel for Respondent -- although indicating that he would consent to the filing of *amicus curiae* briefs on the merits if the Court should grant the petition -- declined to consent. Accordingly, this motion is necessary.

WLF is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. *See, e.g., Zadvydas v. Davis,* 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999); *Al Najjar v. Ashcroft,* 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988).

The Honorable Jesse Helms is a United States Senator from North Carolina. The Honorable Bob Barr, the Honorable Joe Barton, the Honorable George Gekas, the Honorable Walter Jones, the Honorable Lamar Smith, the Honorable John E. Sweeney, and the Honorable Dave Weldon are United States Representatives from, respectively, Georgia, Texas, Pennsylvania, North Carolina, Texas, New York, and Florida. Rep. Gekas is Chairman of the Immigration and Claims Subcommittee of the House Judiciary Committee; Rep. Smith is the former Chairman of the Subcommittee. All believe strongly that Congress and the Executive Branch ought to be permitted to protect American citizens by imposing finite periods of detention on those

removable aliens who have been adjudged guilty of aggravated felonies. All are supporters of the mandatory detention provisions of 8 U.S.C. § 1226(c) and believe that it is fully consistent with the requirements of the U.S. Constitution.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of recent terrorist attacks in this country, proposed *amici* believe that the political branches of government must be afforded broad power to detain aliens who are convicted of aggravated felonies. Where those aliens admit they are here illegally but nonetheless are fighting deportation based on efforts to win discretionary adjustment of status, proposed *amici* believe that the Immigration and Naturalization Service ("INS") ought to detain such aliens during the time it takes to complete deportation proceedings.

Amici are concerned that the decision below, if allowed to stand, will result in an unwarranted abridgement of the power of the political branches of government to control immigration into this county, a power that historically has been subject to only extremely limited judicial review. The decisions below discuss at great length the alleged rights of illegal aliens who are convicted felons, but do not seem to have taken into account the rights of the federal government to enforce its immigration laws or the rights of those who

may be threatened by Mr. Radoncic's continued presence in American society.

For the foregoing reasons, the Washington Legal Foundation; U.S. Representatives Bob Barr, Joe Barton, George Gekas, Lamar Smith, and John Sweeney; U.S. Senator Jesse Helms; and the Allied Educational Foundation respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: May 31, 2002

QUESTIONS PRESENTED

Whether Respondent's mandatory detention under 8 U.S.C. § 1226(c) violates the Due Process Clause of the Fifth Amendment, where Respondent entered the United States illegally and was convicted of an aggravated felony while unlawfully present in the United States?

The case also raises the following antecedent question:

Whether a federal district court possesses jurisdiction under 28 U.S.C. § 2241 to set aside the action of the Attorney General in detaining a removable alien who entered the United States illegally and was convicted of an aggravated felony while unlawfully present in the United States, despite 8 U.S.C. § 1226(e)'s admonition that "[n]o court may set aside any action or decision by the Attorney General" to detain an alien under § 1226?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 5

I. DEPORTABLE ALIENS CONVICTED OF AGGRAVATED FELONIES HAVE NO DUE PROCESS RIGHT TO REMAIN AT LIBERTY WITHIN AMERICAN SOCIETY WHILE THEY CONTEST THEIR REMOVAL 6

II. *ZADVYDAS* IN NO WAY LESSENS THE NEED FOR THIS COURT TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS . 15

III. THE COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER LOWER FEDERAL COURTS HAVE JURISDICTION TO OVERTURN § 1226(c) DETENTION DECISIONS 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases:

Fiallo v. Bell,
430 U.S. 787 (1977) 9
Hampton v. Mow Sun Wong,
426 U.S. 88 (1976) 9
Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 10
Hoyte-Mesa v. Ashcroft,
272 F.3d 989 (7th Cir. 2001) 17
INS v. Chadha,
462 U.S. 919 (1983) 11
INS v. St. Cyr,
121 S. Ct. 2771 (2001) 14, 19, 20
Mathews v. Diaz,
426 U.S. 67 (1976) 10
Mathews v. Eldridge,
424 U.S. 319 (1976) 7
Miller v. Albright,
523 U.S. 420 (1998) 9
Palko v. Connecticut,
302 U.S. 319 (1937) 8
Parra v. Perryman,
172 F.3d 954 (7th Cir. 1999) . . . . . *passim*
Patel v. Zemski,
275 F.3d 299 (3d Cir. 2001) 5, 10, 13, 15, 19
Poe v. Ullman,
367 U.S. 497 (1961) 9
Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999) 19
Reno v. Flores,
507 U.S. 292 (1993) 14

Page

Rochin v. California,
342 U.S. 165 (1952) 8
Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) 11
United States v. Salerno,
481 U.S. 739 (1987) 8
United States v. Valenzuela-Bernal,
458 U.S. 858 (1982) 9
Youngberg v. Romeo,
457 U.S. 307 (1982) 9
Zadvydas v. Davis,
533 U.S. 678 (2001) . . . . . *passim*

Statutes and Constitutional Provisions:

U.S. Const., art. i, § 9, cl. 2, Suspension Clause 20
U.S. Const., amend. v, Due Process Clause . . . . *passim*

8 U.S.C. § 1101(a)(43)(N) and (U) 4, 20
8 U.S.C. § 1226 . . . . . 6, 18, 19, 20
8 U.S.C. § 1226(c) . . . . . *passim*
8 U.S.C. § 1226(e) 6, 17, 18, 19, 20
8 U.S.C. § 1227(a)(2)(A)(iii) 4
8 U.S.C. § 1231(a)(6) 16
8 U.S.C. § 1231(b)(3) 3
8 U.S.C. § 1231(b)(3)(B)(ii) 3
8 U.S.C. § 1252(g) 19
8 U.S.C. § 1324(a)(1)(A)(i) 2

18 U.S.C. § 371 2

28 U.S.C. § 2241 17

Page

Miscellaneous:

Convention Against Torture, Article 3 3

142 Cong. Rec. 7972 (1995) 12

62 Fed. Reg. 10,312 (1997) 13

SUP. CT. R. 14.1(a) 17

Los Angeles County Wide Criminal Justice Coordination Comm., "Impact of Repeat Arrests of Deportable Aliens in Los Angeles County," July 15, 1992 12

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPS. BOB BARR, JOE BARTON, WALTER JONES, GEORGE GEKAS, LAMAR SMITH, JOHN SWEENEY, AND DAVE WELDON; U.S. SENATOR JESSE HELMS; AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE

The interests of *amici curiae* Washington Legal Foundation, *et al.*, are set forth in the motion accompanying this brief.[1]

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement contained in the Petition for a Writ of Certiorari. In brief, Sabrija Radoncic is a 42-year-old citizen of Serbia-Montenegro who entered the United States illegally in March 1991 (prior to the onset of open warfare in the former Yugoslavia) by sneaking across the border from Mexico near San Diego; he has remained in this country ever since. The record does not state how Mr. Radoncic has supported himself since coming to this country, other than to indicate that he has engaged repeatedly in alien smuggling.

An Immigration Judge (IJ) found that Mr. Radoncic has been arrested on three occasions for alien smuggling: in 1993 in Detroit; in July 1996 in Champlain, New York; and

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

in August 1996 in Vermont. Pet. App. 37a-38a. At least one alien paid Mr. Radoncic $5,000 to smuggle him into the country. *Id.* at 40a, 60a, 62a. The IJ found that Mr. Radoncic was part of a "criminal enterprise": "a large scale smuggling network." *Id.* He characterized Mr. Radoncic's behavior as that of a "seasoned," "experienced," and "hardened" criminal. *Id.* at 61a, 62a.

The August 1996 arrest led to a January 1999 conviction in U.S. District Court for the District of Vermont for smuggling aliens into the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(i), and for conspiring to smuggle aliens into the United States, in violation of 18 U.S.C. § 371. *Id.* at 2a-3a. Mr. Radoncic was sentenced to 18 months in prison, a sentence he began serving in February 1999. *Id.*

In November 1993, Mr. Radoncic and his wife, who are Muslims, applied for asylum on the basis of religious persecution. In March 1996, the Immigration and Naturalization Service (INS) initiated deportation proceedings, charging that Mr. Radoncic and his wife had entered the country without inspection and were not entitled to remain. At a subsequent hearing in July 1996, they conceded deportability but requested asylum, withholding of removal, and voluntary departure in the alternative. *Id.* at 2a. Mr. Radoncic also sought withholding or deferral of removal pursuant to Article 3 of the Convention Against Torture. *Id.*

Following a hearing, the IJ issued a decision on April 11, 2000, denying Mr. Radoncic's application for relief and ordering his removal to Serbia-Montenegro. *Id.* at 22a-71a. The IJ found that Mr. Radoncic had failed to meet his burden of demonstrating that he would be subject to persecution if returned to Serbia-Montenegro. *Id.* at 55a-57a. The IJ

determined that Mr. Radoncic's testimony regarding persecution was not "credible," a persecution claim based largely on "fraudulent" documents presented by Mr. Radoncic that purported to show that he had faced criminal charges in Serbia because of his opposition to the government. *Id.* at 54a-57a. The IJ further determined that because Mr. Radoncic had been convicted of "a particularly serious crime" within the meaning of 8 U.S.C. § 1231(b)(3)(B)(ii), Mr. Radoncic was ineligible for withholding of removal (under either 8 U.S.C. § 1231(b)(3) or Article 3 of the Convention Against Torture). *Id.* at 57a-63a. The IJ explicitly found that if allowed to remain in the country, Mr. Radoncic was "at serious risk to resume his illegal activities in the future," activity that "by its nature poses a risk to the security of the United States." *Id.* at 62a.

Mr. Radoncic appealed that decision to the Board of Immigration Appeals (BIA). By order dated November 13, 2001, the BIA affirmed the IJ's finding that Mr. Radoncic was ineligible for asylum and withholding of removal because he had been convicted of a particularly serious crime. *Id.* at 19a. The BIA also held that he had failed to demonstrate eligibility for *deferral* of removal under the Convention Against Torture because he had failed to produce credible evidence that he would face torture if returned to Serbia-Montenegro. *Id.* at 19a-20a. Accordingly, the BIA dismissed Mr. Radoncic's appeal. *Id.* at 21a. Mr. Radoncic has sought review of that decision in the U.S. Court of Appeals for the Second Circuit and has also asked the BIA to reconsider its decision. Pet. 10.

Mr. Radoncic completed his criminal sentence on May 19, 2000 and was taken into custody by the INS. The INS viewed Mr. Radoncic's detention as mandatory under 8

U.S.C. § 1226(c) because his Vermont convictions constituted "aggravated felony" convictions within the meaning of 8 U.S.C. § 1101(a)(43)(N) and (U), and thus rendered him deportable under 8 U.S.C. § 1227(a)(2)(A)(iii).

After an IJ denied his request for a bail hearing (on the ground that detention was mandatory under § 1226(c)), Mr. Radoncic filed a habeas corpus petition in U.S. District Court for the Eastern District of Pennsylvania. On November 8, 2000, the district court granted the petition. Pet. App. 7a-17a. The court ordered Mr. Radoncic released from detention unless the INS "commences an individual evaluation, including an individual hearing and decision within thirty days, to determine whether the continued detention of Petitioner is necessary to prevent risk of flight or danger to the community." *Id.* at 16a. The court held that § 1226(c)'s mandatory detention provision violated the Fifth Amendment's Due Process Clause, even as applied to aliens (such as Mr. Radoncic) who had entered the country illegally, because: (1) such aliens may not be detained in the absence of evidence that they pose a risk of flight or a threat to the community; and (2) they are entitled to an "individualized evaluation" to determine whether they pose a risk of flight or a threat to the community. *Id.* at 10a-16a. Later that month, Mr. Radoncic posted a $5,000 bond and was released from custody. *Id.* at 5a.

On January 4, 2002, the U.S. Court of Appeals for the Third Circuit affirmed. *Id.* at 1a-6a. The appeals court noted that, in a case decided the previous month, it had invoked the Due Process Clause to strike down 8 U.S.C. § 1226(c) to the extent that it permitted the detention of removable aliens who are still pursuing administrative appeals, in the absence of an individualized finding that the

aliens pose a risk of flight or a danger to the community. *Id.* at 5a (citing *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001)). Although acknowledging that the facts in this case differed "to some extent" from those in *Patel* (*e.g.*, Mr. Radoncic has never had any right to live in this country, while the alien in *Patel* had been a permanent resident alien prior to being convicted of an aggravated felony), the appeals court concluded that "the legal issue is the same" and accordingly affirmed the district court's holding on the basis of its *Patel* decision. *Id.* at 5a-6a. Neither the district court nor the appeals court considered whether it possessed jurisdiction to hear Mr. Radoncic's habeas petition.

REASONS FOR GRANTING THE PETITION

Amici fully support the arguments put forth by Petitioner (hereinafter, the "INS"). The Third Circuit has held an Act of Congress unconstitutional; that alone warrants review of the court of appeals decision. Moreover, the appeals court's decision directly conflicts with a decision of the U.S. Court of Appeals for the Seventh Circuit.

Amici write separately in order to emphasize several points. First, the appeals court's decision is directly contrary to numerous decisions of this Court. The Third Circuit failed to accord the deference demanded by this Court to decisions of Congress and the Executive Branch with respect to immigration matters. That failure is particularly troubling in light of overwhelming evidence that: (1) aliens released from detention pending deportation after having been convicted of aggravated felonies pose a serious public safety risk; (2) the INS has no effective means of assuring the removal of alien felons following the completion of administrative proceedings unless it can detain them while those proceedings are

ongoing; and (3) in a very real sense, alien felons being detained pending removal hold the keys to their jail cells because they can win their freedom at any time so long as they agree to leave the country while their administrative appeals are pending.

Second, the Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), in no way reduces the need to resolve the conflict between the decision below and the Seventh Circuit's decision in *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999). *Parra* is fully consistent with this Court's *Zadvydas* decision, and the Seventh Circuit has given no indication since *Zadvydas* was decided in June 2001 that it is considering abandoning its *Parra* decision.

Third, Congress has unambiguously decreed that the federal courts are not to "set aside any action or decision" of the INS taken pursuant to 8 U.S.C. § 1226 "regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e). It is undisputed that the INS acted pursuant to 8 U.S.C. § 1226 in determining that Mr. Radoncic should be detained pending removal. Accordingly, the Court should grant review in this case to determine whether the lower courts possessed jurisdiction to overturn the INS's decision to detain Mr. Radoncic; § 1226(e) clearly suggests that they did not.

I. DEPORTABLE ALIENS CONVICTED OF AGGRAVATED FELONIES HAVE NO DUE PROCESS RIGHT TO REMAIN AT LIBERTY WITHIN AMERICAN SOCIETY WHILE THEY CONTEST THEIR REMOVAL

In denying Mr. Radoncic's petition for relief from deportation, the IJ characterized Mr. Radoncic's behavior as that of a "seasoned," "experienced," and "hardened" criminal. Pet. App. 61a, 62a. The IJ ordered that Mr. Radoncic be removed, and the BIA affirmed. Although he has appealed that decision, Congress has decreed that those in Mr. Radoncic's position "shall" be detained by the INS pending removal. The Third Circuit nonetheless ruled that Mr. Radoncic has a substantive due process right to be free from detention while he contests the removal order, in the absence of an "individualized" finding that he poses either a risk of flight or a threat to the community.

In so holding, the Third Circuit did not merely dismiss considered views to the contrary from both Congress and the Seventh Circuit. Its decision is also in conflict with numerous decisions of this Court that have emphasized the need for the federal courts to defer to the views of the elected branches of government in immigration-related matters. The Court should grant review to resolve that conflict.

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the federal government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due pro-

cess," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno,* 481 U.S. 739, 746 (1987) (quoting *Rochin v. California,* 342 U.S. 165, 172 (1952), and *Palko v. Connecticut,* 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a federal law that mandates detention of removable aliens who have been convicted of aggravated felonies and who wish to remain in the United States while they contest their removal, particularly where detention is limited to the relatively brief period necessary for all removal proceedings to be completed.[2]

Government detention of individuals -- even those present in this country illegally -- unquestionably implicates the Due Process Clause's prohibition against unwarranted deprivations of "liberty." As the Court has made clear, "Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that Clause protects." *Zadvydas*, 121 S. Ct. 2491, 2498 (2001). But the federal government will often have legitimate reasons to impinge on personal liberty, and any claim that abridgement of personal freedom "shocks the conscience" must be judged in light of the government's justifications for its actions:

---

[2] Although the Third Circuit was not altogether clear on this point, *amici* do not understand the appeals court to have held that the INS violated Mr. Radoncic's rights to *procedural* due process. The appeals court indicated that the Constitution prohibited Mr. Radoncic's detention in the absence of individualized findings that he presented a flight risk or a threat to safety, *without regard to how much process the INS afforded him* before taking him into custody. Pet. App. 5a-6a.

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and the "demands of organized society." *Poe v. Ullman,* 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

Youngberg v. Romeo, 457 U.S. 307, 320 (1982).

When that balancing process is undertaken within the context of immigration matters, the balance tilts decidedly in favor of upholding federal restraints on the liberty of noncitizens imposed by Congress and the Executive Branch in the name of national security and safety. In fact, the law is quite clear that when it comes to matters of immigration policy, the judicial branch has a very limited role to play. "The power to regulate immigration -- an attribute of sovereignty essential to the preservation of any nation -- has been entrusted by the Constitution to the political branches of the Federal Government." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 864 (1982). As a result, the Court has "underscore[d] the limited scope of judicial inquiry" into immigration-related matters. *Fiallo v. Bell,* 430 U.S. 787, 792 (1977). "The power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton v. Mow Sun Wong,* 426 U.S. 88, 101 n.21 (1976). *Accord, Miller v. Albright,* 523 U.S. 420, 455 (1998) (Scalia, J., concurring) ("Judicial power over immigration and naturalization is extremely limited.").

As the Court has explained:

> "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952)).

In conflict with this Court's case law, the Third Circuit declined to defer to Congress's judgment that sound immigration policy requires the detention of deportable aliens who have been convicted of aggravated felonies. *Patel*, 275 F.3d 299, 308, 314 (3d Cir. 2001).[3] In support of its refusal to defer to Congress, the Third Circuit argued:

> The Supreme Court recently addressed this issue [of deference] in *Zadvydas* and distinguished between the deference that must be afforded to immigration policies and the more searching review of the procedures used to implement those policies. 121 S. Ct. at 2501-502. The issue in the present case implicates the latter, the means by which Congress effects its determinations regarding who should be deported and on what basis,

---

[3] *Patel* was argued on the same day as this case, in front of the same three-judge panel. The panel issued a lengthy opinion in *Patel* in December 2001. When the panel issued its decision in this case two weeks later, it provided an extremely truncated version of its due process findings and instead relied on *Patel*, asserting, "[T]he legal issue [in the two cases] is the same." Pet. App. 5a. Accordingly, in setting forth the Third Circuit's rationale in this case, *amici* cite extensively to the *Patel* decision.

> not the actual criteria for deportation. . . [A]s noted above, the Supreme Court in *Zadvydas* made clear that Congress' authority over the means of implementing its policies is limited by the Constitution and need not be accorded deference. 121 S. Ct. at 2501.

Id. at 308, 314.

The Third Circuit's rationale for refusing to defer to Congress is a clear misreading of *Zadvydas*. Nowhere did *Zadvydas* attempt to distinguish between immigration *policies* and immigration *procedures* and to limit deference to issues addressing the former. Rather, the Court stated:

> The Government also looks for support to cases holding that Congress has "plenary power" to create immigration law, and that the judicial branch must defer to executive and legislative branch decisionmaking in this area. . . But that power is subject to important limitations. See *INS v. Chadha*, 462 U.S. 919, 941-942 (1983) (Congress must choose "a constitutionally permissible means of implementing" that power). . . In these cases, we focus upon those limitations. . . The question before us is not one of "'confer[ring] on those admitted the right to remain against the national will'" or "'sufferance of aliens'" who should be removed. *Post,* at 2505-2506 (SCALIA, J., dissenting) (quoting [*Shaughnessy v. United States ex rel.*] *Mezei*, 345 U.S. [206,] 222-223 [(1953)] (Jackson, J., dissenting)). Rather, the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.

Zadvydas, 121 S. Ct. 2502-03. In other words, contrary to the Third Circuit's belief, *Zadvydas* did not create a category of immigration law (*i.e.*, laws that establish "procedures" for carrying out immigration policy) for which judicial deference is unwarranted. Rather, the Court made clear that *all* immigration law is entitled to substantial deference, but that the Court in extraordinary cases will step in -- as where detention of an alien whom the government is unable to remove effectively results in a life sentence.

In adopting § 1226(c), Congress determined that release of alien felons pending removal would entail such an extraordinarily high risk of flight and of danger to the community that detention of all such aliens (pending completion of removal proceedings) was mandated. In conflict with numerous decisions of this Court, the appeals court refused to defer to Congress's assessment of the risks involved. Congress had good reason to fear that release of alien felons pending removal posed a significant risk to public safety. For example, a General Accounting Office report cited during floor debates by a House sponsor of 1996 immigration reform legislation found that "77 percent of noncitizens convicted of felonies are arrested at least one more time" before being deported. 142 Cong. Rec. 7972 (1995). A major study of criminal aliens conducted by Los Angeles County reached a similar conclusion. Los Angeles County Wide Criminal Justice Coordination Committee, "Impact of Repeat Arrests of Deportable Aliens in Los Angeles County" [hereinafter, "Impact"], July 15, 1992. The study traced the activity of 1,875 inmates released from Los Angeles County jail in May 1990 who had been identified by the INS as "deportable aliens." Of those 1,875, 772 had been rearrested *within one year*, and those 772 had been arrested a total of 1,522 times. Impact at iv.

The INS introduced substantial evidence in this case that alien felons released on bond pending removal also pose a significant risk of flight. For example, the INS cited a study indicating that 90% of criminal aliens not detained during removal proceedings end up fleeing. *Patel,* 275 F.3d at 312.[4] The Third Circuit nonetheless refused to defer to Congress's judgment that this evidence justified detention of all alien felons, asserting that substantive due process prohibited the INS from detaining any alien felon unless it could demonstrate that *that* alien would flee: "[E]ven if the ninety percent figure were correct, [§ 1226(c)] requires the imprisonment of the ten percent of aliens who would dutifully report to proceedings." *Id.*

In refusing to defer to Congress's considered judgment on this issue, the Third Circuit appeared to assume that an individual felon's propensity to flee or to commit additional crimes could be determined as a factual matter. That assumption is without foundation; there is never any means by which government officials can predict future behavior of any given individual with 100% accuracy. All Congress can be expected to do is to use available information to predict how a class of individuals is likely to behave if released from detention. It has determined that *any* alien in Mr. Radoncic's position is much more likely than not, if released from detention while removal proceedings continue, either to flee or to commit additional crimes. The Third Circuit's refusal to accept that determination is in conflict with the numerous decisions of this Court that have counseled judicial deference to the political branches of government on immigration mat-

---

[4] The Seventh Circuit relied in part on this study in rejecting a due process challenge to § 1226(c)'s mandatory detention provision. *Parra*, 275 F.3d at 956 (citing 62 Fed. Reg. 10,312, 10,323 (1997)).

ters. *See, e.g., INS v. St. Cyr,* 121 S. Ct. 2271, 2287 n.38 (2001) ("the scope of review on habeas [in immigration cases] is considerably more limited than on APA-style review").

In contrast to the government's strong interest in detaining him, Mr. Radoncic has at most a minimal "liberty" interest in being allowed to roam freely in American society. Indeed, Mr. Radoncic's detention was not solely or even primarily the INS's doing. In a very real sense, Mr. Radoncic at all times held the keys to his cell. He was free to leave detention provided only that he agree to leave the country. A choice between detention or leaving the country could be viewed as a Hobson's Choice for citizens and permanent resident aliens who have reasonable expectations of being permitted to remain in the United States. But self-confessed illegal aliens, such as Mr. Radoncic, who have *never* had any legitimate expectation of being permitted to remain on a permanent basis have, at most, only minimal "liberty" interests in living freely in this country. This Court has never suggested that aliens who are here illegally are entitled to the same level of constitutional protection as citizens or permanent resident aliens. *See, e.g., Reno v. Flores,* 507 U.S. 292, 306 (1993) ("Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings.") Accordingly, when such removable aliens choose incarceration as the price for remaining in this country, their claims that incarceration is depriving them of Fifth Amendment "liberty" ring hollow.

In sum, review is warranted of the Third Circuit's determination that Mr. Radoncic's "liberty" interest in being released into American society outweighs the government's interest in detaining, pending removal, *all* illegal aliens who

have been convicted of aggravated felonies, as a means of preventing flight and protecting public safety.

II. *ZADVYDAS* IN NO WAY LESSENS THE NEED FOR THIS COURT TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS

The Third Circuit acknowledged that its decision striking down § 1226(c) was in conflict with the Seventh Circuit's *Parra* decision. *Patel,* 275 F.3d at 313. The Third Circuit suggested, however, that any conflict was unlikely to persist because *Parra* had been superseded by *Zadvydas*:

> However, *Parra* was decided before *Zadvydas* and thus the Seventh Circuit did not have the benefit of the Supreme Court's analysis of the constitutional concerns presented by mandatory detention of aliens.

Id.

The Third Circuit's suggestion is misguided; there is no inconsistency between *Parra* and *Zadvydas*. This Court made clear in *Zadvydas* that the detention of those who once were classified as permanent resident aliens -- even permanent resident aliens who have been convicted of aggravated felonies -- implicates the Due Process Clause. But the Seventh Circuit in *Parra* did not hold otherwise; it merely held that the minimal "liberty" interests of the alien felon being detained in that case were insufficient to overcome the INS's strong interests in detaining him. *Parra*, 172 F.3d at 958. That holding is in direct conflict with the Third Circuit's holding in this case: the Third Circuit found that the due process balance tilted in favor of the alien felon, even though Mr. Radoncic (as an illegal alien who never had

had any right to live in this country) had an even weaker "liberty" interest than Mr. Parra, who prior to his conviction had been a permanent resident alien.

Zadvydas involved an entirely different balancing process. That case involved permanent resident aliens from Lithuania and Cambodia who, although subject to final removal orders, could not be sent anywhere in the foreseeable future because no country was willing to accept them. The Court concluded:

> [T]he issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States. . . An alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, . . . the Constitution permits detention that is indefinite and potentially permanent.

Zadvydas, 121 S. Ct. at 2502.[5]

In sharp contrast, this case and *Parra* both involved alien felons whose removal proceedings were ongoing. Unlike in *Zadvydas*, neither Mr. Radoncic nor Mr. Parra faced "indefinite and potentially permanent" detention (because removal proceedings would be completed within a relatively short period of time). Moreover, because there is

---

[5] The Court did not answer that "serious question." Rather, it invoked the doctrine of constitutional doubt to interpret 8 U.S.C. § 1231(a)(6) as prohibiting detention of such aliens for more than six months after completion of the deportation process, if "there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 121 S. Ct. at 2505.

no evidence that Serbia-Montenegro is unwilling to accept Mr. Radoncic or that Mexico was unwilling to accept Mr. Parra, both were free to end their detention at any time by leaving the country. Accordingly, nothing in this Court's *Zadvydas* decision is likely to cause the Seventh Circuit to reassess its conclusion that § 1226(c) passes constitutional muster,[6] and the conflict between the Third and Seventh Circuits is likely to persist until resolved by this Court.

III. THE COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER LOWER FEDERAL COURTS HAVE JURISDICTION TO OVERTURN § 1226(c) DETENTION DECISIONS

The Court should also grant review to consider an issue not raised in the petition: whether lower federal courts have jurisdiction to overturn § 1226(c) detention decisions. It is always appropriate, of course, for a court *sua sponte* to raise the issue of its own jurisdiction, and the jurisdictional issue is a "subsidiary question fairly included" within the question presented by Petitioner. SUP. CT. R. 14.1(a).

The district court and Third Circuit asserted jurisdiction over this case under the federal habeas corpus statute, 28 U.S.C. § 2241. However, 8 U.S.C. § 1226(e) clearly suggests that no such jurisdiction exists in the lower federal courts:

---

[6] The Seventh Circuit has been called upon to apply *Zadvydas* in several recent cases. Although none of those cases addressed § 1226(c), none of the opinions contains language suggesting that *Parra*'s continued vitality is subject to question. *See, e.g., Hoyte-Mesa v. Ashcroft*, 272 F.3d 989 (7th Cir. 2001).

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside *any action or decision* by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole. (Emphasis added.)

There is no question that following Mr. Radoncic's release from federal prison in May 2000, the INS detained him "under this section," *i.e.*, under 8 U.S.C. § 1226. Accordingly, the only plausible reading of § 1226(e) is that Congress intended to prohibit federal courts from "set[ting] aside" the INS's decision to detain Mr. Radoncic and other similarly situated criminal aliens.

Although each of the appeals courts to consider the issue has held that § 1226(e) is *not* a bar to habeas corpus claims such as Mr. Radoncic's, those courts have arrived at their decisions by simply ignoring the plain statutory language. The Seventh Circuit evaded the jurisdictional bar in *Parra* by claiming that § 1226(e) prohibits only "[t]wo particular avenues of attack" on detention decisions: (1) an argument that the Attorney General erred in applying § 1226 to an alien; and (2) an argument that he erred in deeming the alien statutorily ineligible for bail. *Parra*, 172 F.3d at 957. The court held that "[a] person who has different legal arguments may present them," including an argument that detention is improper because § 1226(c) is unconstitutional. *Id.* That interpretation of § 1226(e) is not plausible. The second sentence of § 1226(e) does not state that certain types of detention decisions or certain types of legal challenges to detention are barred; rather, it states categorically that "[n]o

court may set aside" an INS decision to detain an alien felon pursuant to § 1226.[7]

The Third Circuit in *Patel* likewise held that § 1226(e) does not bar judicial review of a habeas corpus challenge to INS detention of an alien felon under § 1226. But it did so without any real analysis; it simply cited to *Parra* and stated in conclusory fashion: "[§ 1226(e)], which restricts judicial review of INS decisions made under this section [1226], does not restrict judicial review of its constitutionality." *Patel,* 275 F.3d at 302.

Amici recognize that there is "a strong presumption in favor of judicial review of administrative action," and that the Court has a "rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr,* 121 S. Ct. 2271 (2001). Nonetheless, there is no plausible interpretation of § 1226(e) other than that Congress intended

---

[7] The Seventh Circuit attempted to draw support from this Court's interpretation of another jurisdiction-limiting statute in *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999). The comparison was not well-taken. The statute at issue in *American-Arab,* 8 U.S.C. § 1252(g), sharply limits judicial review of claims by an alien "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against an alien under this Act." The Court concluded that § 1252(g) imposed limits on judicial review *only* when the plaintiffs' claims addressed one of the three types of "decision[s] or action[s]" enumerated in § 1252(g); but the Court made clear that § 1252(g) applied *regardless* of the grounds raised by the alien to challenge the Attorney General's decisions or actions in these three areas. *American-Arab*, 525 U.S. at 482-83. Similarly, 8 U.S.C. § 1226(e) prohibits a court from "set[ting] aside" a decision by the Attorney General to detain an alien felon pursuant to § 1226, *regardless* of the basis for challenging detention.

to preclude *all* lower-court review of an INS decision to detain an alien felon pursuant to § 1226.[8] The Court should grant the petition to consider whether the Third Circuit erred in asserting jurisdiction over Mr. Radoncic's claim.

The only plausible basis for upholding the Third Circuit's assertion of jurisdiction is a finding that § 1226(e) is void as a violation of the Suspension Clause of the Constitution. In light of *St. Cyr*, any effort to deny judicial review of INS detention decisions raises a "serious question" under the Suspension Clause. Nonetheless, *amici* note that the Court has never invoked the Suspension Clause to strike down a federal statute. Moreover, given the strong presumption of constitutionality of federal legislation, the Court should not permit federal courts to assert jurisdiction over a claim in violation of a federal statute without first granting review to determine whether the statute is constitutional.

CONCLUSION

Amici curiae respectfully request that the Court grant the Petition.

---

[8] Section 1226(e) could plausibly be read as not barring claims that the detainee is not actually an alien or has not actually been convicted of an aggravated felony. Detention in such circumstances arguably is not detention "under this section," thereby rendering the statutory bar inapplicable. However, Mr. Radoncic does not contest that he is an alien who entered this country illegally, nor does he contest that the crimes of which he stands convicted are "aggravated felonies" within the meaning of 8 U.S.C. § 1101(a)(43)(N) and (U).

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036

Date: May 31, 2002